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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROBERT ROWLAND and
JOSEPH COSENTINO, M.D.,

Petitioners,

vs.

LEROY W. DEMERY, M.D.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Eleventh Amendment bar a suit for damages in federal court under 42 U.S.C. section 1983 against State officials, where state law requires the State to pay any award against the officials?

PARTIES TO THIS ACTION

The parties to this action are:

1. Robert Rowland.
2. Joseph Cosentino, M.D.
3. Leroy W. Demery, M.D.
4. Lawrence Kupperman.

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IN THE
SUPREME COURT
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ROBERT ROWLAND and
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Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Robert Rowland and Joseph Cosentino, M.D., pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit, that was rendered and entered on June 22, 1984, affirming in part, and reversing and

remanding in part the Order of Dismissal of the United States District Court for the Central District of California, which was entered by the District Court on July 8, 1982.

I

OPINION BELOW

The written opinion of the United States Court of Appeals is attached hereto as Appendix "A".

II

JURISDICTION

The Order of the United States Court of Appeals sought to be reviewed herein was rendered and entered on June 22, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

III

STATUTE INVOLVED

CALIFORNIA GOVERNMENT CODE SECTION 825

"If an employee or former employee of a public entity request the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement

of the claim or action to which the public entity has agreed.

"If the public entity conducts the defense of an employee or former employee against any claim or action with his reasonable good faity co-operation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed, but where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his

employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.

"Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages.

"If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with Section 3560) of Division 4 of Title 1,

the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act."

IV

UNITED STATES CONSTITUTION

ELEVENTH AMENDMENT

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects

of any foreign state."

V

STATEMENT OF THE CASE

This is an action for damages and injunctive relief brought by respondent Dr. Demery, against Kupperman, a California Deputy Attorney General, and petitioners herein, Rowland and Cosentino, the Executive Secretary and Chief Medical Consultant of the California Board of Medical Quality Assurance (BMQA). The complaint alleged that defendants conspired to deprive him of his civil rights, in violation of 42 U.S.C. § 1983, in connection with administrative proceedings before the BMQA that resulted in the conditional revocation of Dr. Demery's license to practice medicine.

In 1977, the BMQA held hearings to determine whether or not to discipline

Dr. Demery for violating provisions of California law governing the dispensing of dangerous drugs and controlled substances by physicians. After a hearing, the BMQA issued an order revoking Dr. Demery's license. The revocation order was stayed by the BMQA, which ordered Demery to be placed on probation for five years, pending his completion of a medical education course and passing an examination.

In his complaint, Demery alleged that Kupperman deprived him of a fair hearing at the disciplinary proceedings by introducing false testimony by the State agents. He further alleged that the BMQA waived the requirement that he complete a medical education course, and that after the time for appealing the BMQA order had passed, that petitioners Rowland and Cosentino proceeded to enforce the waived provision

of the order, thereby depriving him of his right to appeal and to practice medicine. With respect to petitioners Rowland and Cosentino, respondent sought damages and an order requiring Rowland and Cosentino to vacate the BMQA's order and restore his license to practice medicine.

On July 8, 1982, the district court dismissed the complaint against Kupperman on the grounds that he was clothed with absolute prosecutorial immunity for his action as a deputy attorney general in connection with the disciplinary proceedings. The complaint was dismissed against Rowland and Cosentino on Eleventh Amendment grounds, the court finding that, because California law required the State of California to pay damage awards levied against State officials for acts performed in the course of their official duties, any action

for damages against the officials was, in effect, a suit against the State.

On June 22, 1984, the Court of Appeals affirmed the district court's order with respect to Kupperman, but reversed the dismissal as to petitioners Rowland and Cosentino, holding that the Eleventh Amendment immunity was inapplicable.

VI

REASON FOR GRANTING THE WRIT

THE DECISION BELOW RAISES A SIGNIFICANT PROBLEM CONCERNING THE REACH OF SOVEREIGN IMMUNITY UNDER THE ELEVENTH AMENDMENT WHICH THE COURT HAS NOT, BUT SHOULD, ADDRESS.

The fundamental issue presented for review in this case is whether an action for damages brought pursuant to 42 U.S.C. Section 1983 in federal court is barred by the Eleventh Amendment because of the state's

mandatory indemnification of any damage award against the defendant state officials. The decision below should be reviewed because the lower court's re. lution of the issue of Eleventh Amendment immunity conflicts with prior decisions of this Court. Furthermore, this case raises an important issue of constitutional law which the Court has not yet addressed.

The State of California has enacted legislation providing for payment of judgments for damages rendered against its employees acting within the scope of employment. Cal. Govt. Code § 825. The indemnification provisions are mandatory, and are applicable to actions brought under 42 U.S.C. Section 1983. Williams v. Horvath, 16 Cal.3d 834 (1976); Stanford Daily v. Zurcher, 366 F.Supp. 18, 25 (N.D. Cal. 1973); see generally A. Van Alstyne, California

Government Tort Liability Practice § 5.89, at 593-94 (1980). Respondent made no claim or showing that petitioners were acting outside the scope of their employment, nor did he seek punitive or exemplary damages. Furthermore, the State is defending petitioners without a reservation of rights and therefore, California Government Code Section 825 consequently requires the State of California to pay any damages awarded respondent in this action.

Although the Court of Appeals, in its opinion below, assumed that any judgment for damages awarded would be paid by the state pursuant to Government Code Section 825, it nonetheless ruled that Eleventh Amendment immunity did not bar the claim for damages against petitioners. The lower court reasoned that, since the state's payment of any damage award would be the result

of the operation of the indemnification statute, and not the direct result of any judgment against the named officials, that the suit was not, in effect, a suit against the State.

> "When, as here, the state's obligation to pay damages derives not from the nature of plaintiff's claim, but from an entirely collateral, voluntary undertaking on the part of the state, the federal court is in no way exerting power over the state or the state's treasury. If plaintiff prevails on the merits, the court will not be ordering the state to do anything; it will only be ordering the official to pay damages." (App. A at p. 35.)

This reasoning, which ignores the actual effect of the relief sought, by elevating

procedural technicalities over substance and reality, conflicts with this Court's rulings in the area of the Eleventh Amendment. In its most recent application of the Eleventh Amendment immunity, this Court reiterated that the test for determining the applicability of the immunity, where the state officials are the nominal defendants, is whether the effect of the judgment would "expend itself on the public treasury or domain." Pennhurst State School & Hosp. v. Haldeman, ___ U.S. ___, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984).

> "The Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.' Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945). [Citations.] Thus,

"[t]he general rule is that relief sought nominally against an officer is in fact against the soverign if the decree would operate against the latter.' Hawaii v. Gordon, 373 U.S. 57, 58, 83 S.Ct. 1052, 1053, 10 L.Ed. 191 (1963) (per curiam)." Id.

This principle of Eleventh Amendment immunity, mandating a focus on the effect of the relief sought, rather than the parties named in the action, has long been established by this Court's decisions. Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Hawaii v. Gordon, supra; Ford Motor Co. v. Department of Treasury, supra; Great Northern Life Insur. Co. v. Read, 322 U.S. 47 (1944). The prohibition against awarding monetary relief against a state through its officials

applies even though relief is sought under 42 U.S.C. Section 1983. Edelman v. Jordan, supra.

In Edelman, plaintiffs brought suit against individual state officials who allegedly were violating the constitution and federal law, and therefore, the case arguably fell outside the reach of the Eleventh Amendment under Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908). Edelman held, however, that the case was in effect a suit against the state itself because a judgment payable from state funds was demanded, recognizing "that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." 415 U.S. at 663. In this action, as in Edelman, any award "will to a virtual certainty be paid from

state funds and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of legal duty on the part of defendant state officials." Id. at 668.

The Ninth Circuit declined to recognize the effect of California's mandatory indemnification statute as raising the bar of Eleventh Amendment immunity, based in part on its concern that application of immunity would bar payment to civil rights plaintiffs. (App. A at pp. 30-31.) This concern is baseless. California's mandatory indemnification provisions are applicable in actions brought under 42 U.S.C. Section 1983. Williams v. Horvath, 16 Cal.3d 834 (1976). The mandatory indemnification provisions serve the dual purpose of allowing public employees to carry out their duties

without fear of personal liability, and to provide a more certain source of damages payment. Williams v. Horvath, supra at 846-48; Johnson v. State of California, 69 Cal.2d 782 (1968); Stanson v. Mott, 17 Cal.3d 206, 224-25 (1976). Thus, the effect of this statute, contrary to the court of appeals' concerns, is the enhancement of the rights of plaintiffs under the federal civil rights act. Williams v. Horvath, supra at 847. The effect of the application of Eleventh Amendment immunity is not the extinguishing of a plaintiff's claim, but the limiting of the forum for prosecution of the claim to state court, which has concurrent jurisdiction over section 1983 actions. Brown v. Pitchess, 13 Cal.3d 518, 521-23 (1975).

The Ninth Circuit was of the opinion that an extension of sovereign immunity

was foreclosed by this Court's decision in Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). (App. A at pp. 24-25.) In Scheuer v. Rhodes, the Court held that the ultra vires doctrine of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) would be applied to actions for damages against state officials. 416 U.S. at 235. Following Scheuer, a long line of cases have held that where it is alleged that defendant state officials deprived a plaintiff of federal rights while acting beyond their authority, the Eleventh Amendment permits an action to be maintained against the officials in their individual capacities. See, e.g., Karpovs v. Mississippi, 663 F.2d 640, 644-45 (5th Cir. 1981); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1350 (9th Cir. 1981, aff'd on other grounds sub nom. Kush v. Rutledge, ___U.S.

___, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983); Nevels v. Hanlon, 656 F.2d 372, 377-78 (8th Cir. 1981).

These decisions, validating suits against state officials in their individual capacities against the claim of an Eleventh Amendment bar, are not controlling here. An allegation that an official is sued in his "individual capacity" does not mean that there will be no impact on the public treasury, which will bring the action within the prescription of the Eleventh Amendment. In analyzing whether the Eleventh Amendment bar exists, each claim within the case must be examined to determine if, in fact, there will be an impact on the state treasury. Pennhurst State School & Hosp. v. Haldeman, supra, 104 S.Ct. at 919. Where, as here, the federal court relief sought will expend itself on the state

treasury, an allegation that the action is being pursued against defendants in their individual capacities should not be allowed to circumvent the bar of the Eleventh Amendment.

One of the primary purposes of the Eleventh Amendment, which this Court has consistently recognized, is the preservation and protection of the states administration of their fiscal affairs. Pennhurst State School & Hosp. v. Haldeman, supra, 104 S.Ct. at 917; Edelman v. Jordan, supra, 415 U.S. at 673. Because of the importance of state sovereignty it is to be construed broadly.

> "To secure the manifest purpose of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted not literally and too

narrowly, but fairly and with such breadth and largeness as effectively to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

In re Ayers, 123 U.S. 443, 505, 8 S.Ct. 164, 31 L.Ed. 216 (1887).

VII

CONCLUSION

Although the Ninth Circuit recognized the fact that any judgment for damages would effectively be paid by the State of California, it nonetheless refused to recognize this effect as raising the bar of Eleventh Amendment immunity, on wholly technical and procedural grounds. The lower court's resolution of this issue ignores the teachings of this Court, in its prior opinions, requiring the federal courts to examine the real impact and effect of the relief sought in determining their jurisdiction, rather than by applying literal and narrow interpretations of the Eleventh Amendment. See In re Ayers, supra.

No prior opinion of this Court has ruled on the effect of state indemnification statutes in the context of the Eleventh Amendment.

Review by this Court is necessary to correct a misinterpretation of the reach of sovereign immunity which, if allowed to stand, could seriously impair the ability of California, and the several states, to assert their constutional immunity under the Eleventh Amendment.

For these reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

APPENDIX A

Leroy W. DEMERY, M.D.,
Plaintiff-Appellant

v.

Lawrence KUPPERMAN, Deputy Attorney General of the State of California; Robert Rowland, Executive Secretary of the board of Medical Quality Assurance and Joseph Cosentino, M.D., Medical Consultant to the Board of Medical Quality Assurance, Defendants-Appellees.

No. 82-5710

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Sept. 9, 1983

Decided June 22, 1984.

Appeal from the United States District Court for the Central District of California.

Before HUG and REINHARDT, Circuit Judges, and PANNER,* District Judge.

REINHARDT, Circuit Judge:

Dr. Demery appeals the dismissal of his complaints against the California Deputy

*Honorable Owen Murphy Panner, United States District Judge for the District of Oregon, sitting by designation.

Attorney General and the Executive Secretary and the Chief Medical Consultant of the California Board of Medical Quality Assurance (BMQA). The complaint alleged that the defendants conspired to deprive Dr. Demery of his civil rights. The alleged conspiracy occurred in connection with administrative proceedings that resulted in the conditional revocation by the BMQA of Dr. Demery's license to practice medicine.

The district court dismissed both complaints on immunity grounds. Dismissal of the complaint against the Deputy Attorney General was based on the prosecutor's absolute immunity from civil rights damage suits challenging quasi-judicial actions. The complaint against the other two defendants was dismissed on eleventh amendment grounds. We affirm the dismissal of the complaint against the Deputy Attorney General

but reverse the dismissal of the complaint against the other two defendants.

FACTS

In 1977, the BMQA held hearings to determine whether to discipline Dr. Demery. Dr. Demery was accused of prescribing dangerous drugs without a prior good faith examination of the patient, a violation of California Business and Professional Code section 2399.5, Cal.Bus. & Prof.Code §2399.5 (West 1974) (repealed 1980), and of prescribing controlled substances not in the regular practice of his profession, a violation of California Health and Safety Code section 11154, Cal.Health & Safety Code § 11154 (West 1975) (amended 1982). Dr. Demery claims that the charges against him were based on, tnd that the outcome of the BMQA hearings was influenced by, the perjured testimony of state agents. He claims that

the perjured testimony was wilfully induced by Deputy Attorney General Kupperman.

After the hearing, the BMQA issued an order revoking Dr. Demery's medical license. The BMQA stayed its order and ordered that Dr. Demery be placed on probation for five years upon completing a six-month medical education course and passing an oral examination. Dr. Demery alleges that the BMQA subsequently waived the requirement that he complete the medical education course. He claims that, relying on the waiver, he allowed the time for appealing the BMQA's order to pass. He claims further that Deputy Attorney General Kupperman issued a verbal opinion revoking the waiver but failed to notify him of the revocation.

After the time for appealing the BMQA's order had passed, defendants Rowland and Cosentino proceeded to enforce the allegedly

waived provisions of the BMQA's order. Dr. Demery was also subsequently convicted criminally of prescribing controlled substances without a prior good faith examination. He was sentenced to a period of incarceration.[1]

In 1981, Dr. Demery initiated this action under 42 U.S.C. § 1983 (1976). He alleged that, by inducing the state agents to testify falsely, defendant Kupperman deprived him of his right to a fair hearing. He also alleged that defendant Kupperman, by revoking the waiver and failing to notify Dr. Demery of the revocation, and defendants Rowland and Cosentino, by wrongfully enforcing the waived provisions after the time for appeal had passed, conspired to

1. In his brief, Dr. Demery raises several challenges to his state court trial. Those issues are not properly before us. Dr. Demery filed a petition for writ of habeas corpus, but he did not appeal the district court's denial of his petition.

deny him his right to an appeal and his right to practice medicine. Dr. Demery asked that the district court award him five million dollars in damages and order the defendants to "take whatever steps are necessary to have the [BMQA] vacate the administrative order relating to [Dr. Demery] and immediately restore his license to practice medicine."

The district court dismissed the complaint against defendant Kupperman on the ground that, because the complaint alleged acts Kupperman would have performed in his capacity as a prosecutor, Kupperman was "cloaked with absolute immunity from this type of suit." The court also dismissed the complaint against defendants Rowland and Cosentino, holding that, because California law required California to pay whatever damages the court awarded Dr. Demery, Dr.

Demery's suit was barred by the eleventh amendment.[2] We affirm the dismissal of Dr. Demery's complaint against defendant Kupperman, but reverse the dismissal of the complaint against defendants Rowland and Cosentino.

DISCUSSION

1. Defendant Kupperman

Dr. Demery alleges that defendant Kupperman deprived him of his civil rights by (a) wilfully inducing certain investigative agents to coomit perjury, and (b) failing to notify Dr. Demery that he was revoking the BMQA's waiver of certain requirements

[2] Dr. Demery's original complaint against Rowland and Cosentino was dismissed, with leave to amend, for failure to state with specificity the facts necessary to support his allegations. Dr. Demery then filed an amended complaint. References in this opinion to the complaint against Rowland and Consentino are references to the amended complaint.

contained in the BMQA's order of August 31, 1977. He seeks both damages and equitable relief.

With regard to the prayer for equitable relief, the complaint against Kupperman was properly dismissed. Dr. Demery does not contend, and it does not appear, that Deputy Attorneys General have any role whatever in the issuance or vacation of BMQA orders or in the revocation or restoration of medical licenses. See Cal. Const. art. V.§ 13 (describing powers of ATtorney General); Cal.Bus,& Prof. Code §§ 2000-22 (West 1984) (describing powers, duties, and structure of BMQA). The Attorney General simply acts as legal counsel to the board in judicial and administrative proceedings against it. See Cal.Bus. & Prof. Code § 2020 (West 1984).

With regard to the prayer for damages, Dr. Demery argues that, because the conduct that allegedly gave rise to the civil rights violations was administrative or investigative, not quasi-judicial, in nature, the district court erred in finding Kupperman absolutely immune. We agree with the district court that Kupperman was absolutely immune from this type of suit.

In enacting section 1983, Congress did not abrogate the common-law immunity that state officials traditionally enjoyed. See Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). The contours of prosecutors' immunity from section 1983 suits were outlined by the Supreme Court in Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) and Butz v. Economou, 438 U.S. 478, 98 S.Ct. 984, 57 L.Ed.2d 895 (1978). In Imbler, the

Court held that prosecutors, both state and federal, are absolutely immune from section 1983 damage suits challenging conduct "intimately associated with the judicial phase of the criminal process." Imbler, 424 U.S. at 430, 96 S.Ct. at 995. It expressly declined to "consider whether like or similar reasons require imkunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." Id. at 430-31, 96 S.Ct. at 994-95. The Court thus left standing the Ninth Circuit rule, enunciated in Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965), that a prosecutor is absolutely immune when he acts in a "quasi-judicial capacity," but that he enjoys only a qualified immunity "[i]f he acts in the role of a policeman." Id. at 536.

In Imbler, the Court recognized that the line between "administrative" or "investigative" acts and "quasi-judicial" acts is not always a clear one. It noted that some of the duties of a prosecutor in his role as an advocate for the state involve actions that may also be denominated "administrative" or "investigative." 424 U.S. at 430-31 and note 33, Id., 96 S.Ct. at 995 and n. 33. It declined, however, to lay down rules for determining which such duties would give rise to absolute prosecutorial immunity. We recently undertook that task in Freeman ex rel. the Sanctuary v. Hittle, 708 F.2d 331 (9th Cir. 1983) (per curiam) and Ybarra v. Rose, 723 F.2d 675 (9th Cir. 1984). In those cases, we held that that absolute prosecutorial immunity attaches to the actions of a prosecutor if those actions were performed as part of

the prosecutor's preparation of his case, even if they can be characterized as "investigative" or "administrative." Freeman, 708 F.2d at 443 ("investigative" acts); Ybarra, 723 F.2d at 679 ("administrative" acts).

In Butz v. Economou, the Supreme Court held that officials performing the functions of a prosecutor in administrative proceedings are entitled to the absolute prosecutorial immunity described in Imbler. Butz, 438 U.S. at 511-12, 98 S.Ct. at 2913-14. Although Butz involved federal administrative officials, we have held that the Imbler immunity also applies to state administrative officials who perform functions analogous to those of a prosecutor. Sellars v. Procunier, 641 F.2d 1295, 1303 (9th Cir.), cert. denied, 454 U.S. 1102, 102 S.Ct. 678, 70 L.Ed.2d 644 (1981).

The first of Dr. Demery's claims against Kupperman is squarely controlled by the Sypreme Court's holdings in Imbler and Butz, as refined by our holdings in Freeman and Ybarra. Appellant contends that Kupperman induced witnesses to testify falsely. The alleged inducement occurred while Kupperman was conferring with the witnesses for the purpose of determining whether to bring charges against Dr. Demery. We think that conferring with potential witnesses for the purpose of determining whether to initiate proceedings is plaint a function "intimately associated with the judicial phase of the criminal process," Imbler, 424 U.S. at 430, 96 S.Ct. at 995, and is therefore a quasi-judicial function "to which the reasons for absolute immunity apply with full force." Id. We doubt that such a function can be characterized as "administrative"

or "investigative." See Heidelberg v. Hammer, 577 F.2d 429 (7th Cir. 1978) (prosecutor absolutely immune from suit alleging that he falsified line-up reports); Lee v. Willins, 474 F.Supp. 970 (E.D.N.Y.) (prosecutor absolutely immune from suit alleging that he coerced false testimony), aff'd, 617 F.2d 320 (2d Cir.), cert. denied, 449 U.S. 861, 101 S.Ct. 165, 66 L.Ed.2d 78 (1980). But even if it could be so characterized, Kupperman is immune under our holdings in Freeman and Ybarra, for conferring with potential witnesses regarding their knowledge of underlying events is plainly part of a prosecutor's preparation of his case. The fact that inducing false testimony is wrongful and indefensible is not relevant to the question whether immunity attaches. Underlying the doctrine of absolute immunity is a recognition that the advancement of

broader public policies sometimes requires that concededly tortious conduct, no matter how reprehensible, go unremedied, at least by means of a civil action for damages.

Dr. Demery next complains of Kupperman's failure to notify him of the revocation of the waiver of the medical course requirement. Because that failure did not occur in connection with the preparation of the case, our holdings in Freeman and Ybarra do not in terms control. We believe, however, that the principle that underlie the doctrine of absolute prosecutorial immunity require a holding that prosecutors are absolutely immune from civil suits alleging wrongdoing with regard to post-litigation as well as pre-litigation handling of a case.

The necessity for absolute prosecutorial immunity was summarized by the Supreme

Court in Butz v. Economou, 438 U.S. 478, 512-13, 98 S.Ct. 2894, 2913-14, 57 L.Ed.2d 895 (1978). First, prosecutors are, like judges and witnesses, particularly susceptible to harrassment suits because "[t]he loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus." Butz, 438 U.S. at 512, 98 S.Ct. at 2913. As the Court stated in Imbler, "a defendant will often transform his resentment at being prosecuted into the ascription of improper and malicious actions to the state's advocate." Imbler, 424 U.S. at 425, 96 S.Ct. at 992. Second, "the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." Butz, 438 U.S. at 512, 98 S.Ct. at 2914. Most important among these safeguards is

the correctability of error on appeal and through collateral attack.

The first factor focuses on the prosecutor's status, not on the nature of the claim against him. This factor thus weighs just as heavily in favor of immunity for a prosecutor's handling of a case after trial as before and during trial. Because by hypothesis resentful defencants initiate suits irrationally or for purposes of harassment, they are just as likely to accribe unconstitutional purposes to the prosecutor's post-trial acts as to his acts before and during trial.

The second factor also favors absolute prosecutorial immunity for a prosecutor's post-trial acts, for the "safeguards built into the judicial process" apply to those acts as well. For instance, if Dr. Demery had a right to be notified of a revocation

of the waiver of the medical-course requirement, his failure to receive that notice would render the revocation ineffective. In addition, if he had a right to be notified of the revocation before his time for appeal had run, it is likely that the time for appeal would be considered tolled under state law. Like allegations of misconduct during the trial preparation stage, allegations of misconduct in a prosecutor's post-trial handling of a case can generally be corrected without resort to a civil trial for damages. This claim, like the claim in Ybarra, is the type that "the Supreme Court, in its wisdom, wanted to prevent and recognized would be better handled by various post-trial remedies ...." Ybarra, 723 F.2d at 679-80 (quoting Ybarra v. Rose, No. 81-4922, slip op. at 9 (C.D. Cal. Dec. 30, 1981)).

We thus do not believe that a meaningful distinction can be drawn, for purposes of applying the immunity described in Imbler, between a prosecutor's post-trial handling of a case and his handling of a case before or during trial. In accordance with the Court's holding in Butz that this immunity applies equally in the context of administrative proceedings, we hold that defendant Kupperman is absolutely immune from the claim for damages based on the allegation that he wrongfully failed to notify Dr. Demery of the revocation of the waiver of the medical-course requirement.

II Defendants Rowland and Cosentino

Dr. Demery claims that, by enforcing the waived provisions of the BMQA's order, defendants Rowland and Cosentino denied him his right to an appeal and his right

to practice medicine. He seeks damages and an order requiring the defendants to take steps to vacate the BMQA's order and restore his license to practice medicine.

The district court dismissed the complaint against Rowland and Cosentino on eleventh amendment grounds. It found that, because California law requires California to pay damage awards levied against California officials for acts performed in the course of their official duties, the relevant precedents and required dismissal. We reverse.

A. The General Rules

The eleventh amendment provides that

> [t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of

another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The amendment has been read as a constitutionalization of the principle of state sovereign immunity. See Pennhuyrst State School & Hospital v. Halderman (Pennhurst II), ___ U.S. ___, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). Accordingly, the amendment has, despite its limited terms and its unambiguous language, been held to bar suits against states brought by its own citizens. See Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

While it is now clear that the eleventh amendment bars from the federal courts most[3] suits against states that have

[3] The eleventh amendment does not bar suits against a state brought by the United States, Employees of the Department of Public Health & Welfare v. Department of Public Health & (cont.)

not consented to being sued, determining whether a suit is against a state is not always a simple task. The amendment, of course, generally bars suits in which a state is the named defendant. See Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 846-59, 6 L.Ed. 204 (1824). But the amendment also bars some suits in which the named defendant is a state official. The test for determining which suits against state officials are treated as suits against the state for eleventh amendment purposes has been variously articulated:

3 (cont.)

Welfare, 411 U.S. 279, 289, 93 S.Ct. 1614, 1620, 36 L.Ed.2d 251 (1973), or by a sister state, United States v. Missippi, 380 U.S. 128, 140-41, 85 S.Ct. 808, 814-15, 13 L.Ed. 2d 717 (1965). Nor does the amendment bar suits against states by individuals when Congress has overridden the states' soverign immunity through legislation enforcing section 5 of the fourteenth amendment. Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). See also the Ex parte Young exception, discussed infra.

"The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter," Hawaii v. Gordon, 373 U.S. 57, 58, 83 S.Ct. 1052, 1053, 10 L.Ed.2d 191 (1963) (Per curiam); "The Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'" Pennhurst II, 104 S.Ct. at 908 (quoting Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 350 89 L.Ed. 389 (1945); "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" Dugan v. Rank, 372 U.S. 609, 620,

83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963) (citations omitted).

Under those general rules, the damage claim against Rowland and Cosentino plainly emerges as one not against the state. Section 1983, under which Demery brings suit against those individuals, confers on Dr. Demery a cause of action at law against "[e]very person" who, under color of state law, subjects him to "the deprivation of any rights, privileges, or immunities secured [him] by the Constitution and laws." 42 U.S.C. § 1983 (1976). As the Supreme Court has emphasized, a state official who violates federal law "is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." Scheuer v. Rhodes, 416 U.S. 232, 237, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90

(1974) (quoting Ex parte Young, 209 U.S. 123, 160, 28 S.Ct. 441, 454, 52 L.Ed.714 (1908)) (emphasis supplied in Scheuer). Accordingly, the Court has distinguished section 1983 claims from claims "seeking damages from the public treasury," Scheuer, 416 U.S. at 238, 84 S.Ct. at 1687, and has expressly held that damage actions brought under section 1983 "seeking to impose individual and personal liability on" state officials "are not barred by the Eleventh Amendment." Id. Because Dr. Demery plainly seeks damages from Rowland and Cosentino personally, his action is not barred by the eleventh amendment.

B. Ex Parte Young and Prospective Injunctive Relief

An important exception to the general rules mentioned above has long been recognized. In Ex parte Young, 209 U.S. 123,

28 S.Ct. 441, 52 L.Ed. 714 (1908), the Supreme Court made it clear that a suit against a state official seeking injunctive relief from unconstitutional state action is not a suit against the state, regardless of whether the state is the real party in interest. Although the Court has since ruled that the Ex parte Young exception permits only suits for prospective injunctive relief, see Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Ex parte Young principle, as so limited, has repeatedly been reaffirmed. See, e.g., id. at 664, 94 S.Ct. at 1356; Quern v. Jordan, 440 U.S. 332, 345, 99 S. Ct. 1139, 1147, 59 L.Ed.2d 358 (1979).

Although Dr. Demery's action for equitable relief against Rowland and Cosentino would be a suit against California under the general rules, it plainly falls

within the Ex parte Young exception. Because he alleges unconstitutional state action and seeks only prospective injunctive relief, his equitable claim is not barred by the eleventh amendment. The district court's dismissal of the claim on eleventh amendment grounds was erroneous.[4]

C. Edelman v. Jordan and State Indemnification

Defendants assert that they are in a different position from most section 1983 defendants because California has enacted a law requiring the state to pay damage awards levied against California officials

[4] We express no opinion regarding whether either Rowland or Cosentino possesses any power to confer the relief Dr. Demery seeks. Nor do we consider whether injunctions of the type Dr. Demery seeks are available under section 1983. Because the district court considered neither of those questions, we remand the claim for equitable relief to the district court for initial consideration of all appropriate issues other than the eleventh amendment question.

for acts performed in the course of their official duties. Cal.Gov't. Code § 825 (West 1980).[5] Defendants argue that because any damages Dr. Demery is awarded

[5] California Government Code section 825 reads in relevant part as follows:

> If any employee or former employee of a public entity request [sic] the public entity to defend him against any claim or action against him for any injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such request is made in writing but less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.
>
> If the public entity conducts the defense of an employee or former employee against any claim or action with his reasonable good faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed, but, where the public entity conducted such defense pursuant to an agreement with the employee or former employee (cont.)

must, under California's law, be paid from public funds in the state treasury, Dr. Demery's claim is a suit against California under the rule that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." Edelman v. Jordan, 415 U.S. 651, 663. 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662

5 (cont.)

> reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.
>
> Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages. Cal.Gov't Code § 825 (West 1980). We assume for purpose of this opinion that Rowland and Cosentino would be indemnified by California.

(1974). That argument lacks merit.

Defendants' argument is foreclosed by our post-Edelman holding in Ronwin v. Shapiro, 657 F.2d 1071 (9th Cir. 1981). In that case, student members of the Arizona Law Review were sued for publishing allegedly libelous material. We held that the defendants were not immune even though Arizona had a law that, we assumed, would have required the state to indemnify them if they lost. 657 F.2d at 1074 n.5. The Arizona law, we said, was "'a purely intramural arrangement'" between a state and its officers that a state should not be able to turn into an extension of sovereign immunity. 657 F.2d at 1074 (quoting L. Tribe, American Constitutional Law, 133 n. 22 (1978)). We noted the incongruity that would result if a state, "'by creating a fund to compensate victims, has somehow

extended immunity [to state employees] so as to deny payment to the class of intended beneficiaries.'" Id. at 1075 (quoting Palmer v. Penn-Ohio Road Materials, Inc., 470 F.Supp. 1199, 1203 (W.D.Pa. 1979)).[6]

Our holding applies as strongly in the instant case. Indeed, a contrary holding would be even more anomalous when, as here, federal rights are at stake[7]--a

[6] We reject the statement in the concurring opinion in Ronwin that the language we rely on is dictum. In any event, we believe that the rule the majority states is correct and apply it here.

[7] Indeed, it has been persuasively argued that the framers of the eleventh amendment did not intend to shield the states from suits based on federal questions; they rather meant only to repeal that part of article III that extended the judicial power to "Controversies ... between a State and Citizens of another State." U.S. Const. Art. III, § 2, cl. 1. See Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum.L. Rev. 1889 (1983).

state would then have the power effectively to prevent vindication of federal rights in federal court. As the Court stated in Ex parte Young, 209 U.S. 123, 159-60, 28 S.Ct. 441, 453-54, 52 L.Ed. 714 (1908), and repeated in Scheuer, 416 U.S. at 237, 94 S. Ct. at 1687, "[a] state has no power to impart to [state officers] any immunity from responsibility to the supreme authority of the United States." We are thus unable to accept the proposition that a state may extend sovereign immunity to state officials merely by enacting a law assuming those officials' debts. See also Rochester Methodist Hospital v. Travelers Insurance Co., 728 F.2d 1006 (8th Cir. 1984); Downing v. Williams, 624 F.2d 612 (5th Cir. 1980), vacated on other grounds, 645 F.2d 1226 (5th Cir. 1981).

Our holding is fully consistent with Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Although the Edelman language defendants rely on, see supra at 2664, superficially supports defendants' argument, the rest of Justice Rehnquist's opinion makes it clear that the Court did not intend that a state may extend eleventh amendment immunity to its officials simply by enacting a statute by which it undertakes to indemnify officials for damage awards assessed against them.

In Edelman, the defendants were state officials responsible for administering federal-state disability benefits. The complaint charged that the state officials had violated federal regulations and the courteenth amendment to the United States Constitution. Plaintiffs asked the district court to issue an injunction ordering the

state officials to release all benefits wrongfully withheld. The complaint thus prayed that the federal court order the state officials to disburse state funds they were responsible for administering. In holding that the eleventh amendment barred the federal courts from granting such relief, the Court laid great stress on the federalism concerns underlying the eleventh amendment, concerns that it felt would be subverted if federal courts could "order [state officials] to use state funds to make reparations for the past," 415 U.S. at 665, 94 S.Ct. at 1357 (quoting Rothstein v. Wyman, 467 F.2d 226, 237 (2d Cir. 1972), cert. denied, 411 U.S. 921, 93 S.Ct. 1552, 36 L.Ed.2d 315 (1973)). See also Pennhurst II, 104 S.Ct. at 915-17 (stressing the eleventh amendment's basis in federalism).

The federalism concerns that influenced the Court's holding in Edelman are entirely absent from this case. When, as here, the state's obligation to pay damages derives not from the nature of plaintiff's claim, but from an entirely collateral, voluntary undertaking on the part of the state, the federal court is in no way exerting power over the state or the state's treasury. If plaintiff prevails on the merits, the court will not be ordering the state to do anything; it will only be ordering the official to pay damages. If the state official desires indemnification under the state statute, he must bring suit in a state court. See Pennhurst II. And if plaintiff prevails in his suit against the officials, any suit by him seeking to enforce his award against the state in federal court would be barred by the eleventh amendment.

See Glosen v. Barnes, 724 F.2d 1418 (9th Cir. 1984).

Because the problems the Edelman Court faced are absent here, and because a contrary rule would produce considerable and unacceptable incongruities, see supra, we read the Edelman language defendants rely on as simply another articulation of the general rules mentioned above. That the Court was restating, not modifying, these general rules is demonstrated by its citation of the Ford Motor test immediately before using the language defendants rely on. In fact, in a subsequent opinion, Justice Rehnquist, again writing for the Court, described the holding in Edelman expressly as a "reaffirm[ation] [of] the rule that had evolved in ... earlier [Supreme Court] cases." Quern v. Jordan, 440 U.S. 332, 337, 99 S.Ct. 1139, 1143, 59 L.Ed.2d

358 (1979). If, as the Court has maintained, Edelman does not depart from prior law on this point, the language cited by defendants must be read in light of the following implicit qualification: the eleventh amendment bars suits that seek to impose a liability that, because of the nature of the claim asserted, "must be paid from public funds in the state treasury."

Here, the state's obligation to pay does not derive from the nature of plaintiff's claim. Defendants Rowland and Cosentino are being sued for damages for which, as Scheuer makes clear, the United States has made them individually liable. The suit is not essentially one against the state: California's law does not, and cannot, change the nature of the federal claim. California's obligation to pay the damages awarded against its employees

derives from an entirely collateral and voluntary undertaking on the part of the state. The Edelman rule thus does not apply.

Defendants also cite Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981), to support their eleventh amendment argument. In Rutledge, we held that the eleventh amendment did not bar a federal civil rights suit against state officials. In so holding, we noted that "[n]either the district court nor [the state official] have pointed to any law of the State of Arizona that would require that any damages, for which [the state official] would be liable ..., be paid from state funds." 600 F.2d at 1350. While that statement may suggest that state payment of damages is necessary for eleventh amendment immunity to apply, it does not indicate that such payment is sufficient to give rise to

eleventh amendment immunity. Because the state was not required to pay the damages, it was not necessary for us to consider in Rutledge whether the defendants would have been entitled to eleventh amendment immunity had Arizona been required to indemnify the state officials. We considered and rejected that argument in Ronwin. Ronwin, not the negative inference defendants invite us to draw from Rutledge, states the rule in this Circuit.

D. Pennhurst II

The Supreme Court's recent opinion in Pennhurst II, supra, also contains language that, if interpreted literally would compel a holding that Dr. Demery's claim is barred by the eleventh amendment. However, read in context, it is clear that that language too is consistent with our

holding.[8]

In Pennhurst II, the Court read Edelman v. Jordan, supra, as holding that the

[8] The concurring opinion suggests that it is unnecessary for us to discuss Pennhurst II's interpretation of Edelman because Pennhurst II was not relied upon by the parties. However, the eleventh amendment is a limitation on federal subject-matter jurisdiction. Even when neither party has raised an objection to a federal court's subject-matter jurisdiction, the court has an obligation to consider the issue sua sponte, and to consider it fully. Chicago, Burlington and Quincy Railway Co. v. Willard, 220 U.S. 413, 418-22, 31 S.Ct. 460, 461-63, 55 L.Ed. 521 (1981). A fortiori, when state officials raise an objection that eleventh amendment immunity applies, a federal court must consider all relevant arguments whether or not specifically advanced by the state officials. Because the Pennhurst II language would, if read literally, support appellees' claim that they are entitled to eleventh amendment immunity, we are obligated to consider that language here.

The concurring opinion also appears to dismiss the Supreme Court's language as dictum. We agree with our concurring colleague that the precise holding in Pennhurst II is inapplicable to this case. However, we believe it would be inappropriate to ignore entirely the Supreme Court's most recent pronouncements on the eleventh

(cont.)

amendment bars some actions that are not suits against states. See Pennhurst II, 104 S.Ct. at 909. Later in the opinion, the Court described the suits that, as it interpreted Edelman, are barred from federal court by the eleventh amendment even though they are not suits against the state: "Under Edelman v. Jordan, supra, a suit against state officials for retroactive monetary relief, whether based on federal or state law, must be brought in state court." Pennhurst II, 104 S.Ct. at 920. Under that test, if the language were read

8 (cont.)

amendment even if they are dicta.

In any event, it is clear that our concurring colleague agrees with our holding that, despite the Pennhurst II language that is "bothersome" if interpreted literally (see concurring opinion at 2669), the eleventh amendment does not bar a suit seeking damages against a state official personally. Any such conclusion must, in our view, necessarily include a determination that nothing in Pennhurst II requires a contrary result.

literally, Dr. Demery's claim would be barred by the eleventh amendment even though it is not a claim against California. The problem is that, if the Pennhurst II language were read so broadly, the eleventh amendment would bar all section 1983 damage suits from the federal courts, for all such suites are against state officers and are for "retroactive monetary relief."

If that had been the intended holding in Pennhurst II, Scheuer v. Rhodes, supra, would in effect have been overruled and section 1983 would in effect have been rendered ineffective. We are very reluctant to read Pennhurst II as having accomplished so significant a reversal in such an important area of our jurisprudence without having discussed either Scheuer v. Rhodes or section 1983. Because an interpretation of the Pennhurst II language that is

consistent with both Scheuer v.Rhodes or decades of section 1983 jurisprudence is available, we decline to interpret Pennhurst II as having effectuated such a radical change in the established law of civil rights.

In Pennhurst II, the Court first acknowledged that "[w]hen a suit is brought only against state officials, a question arises as to whether that suit is a suit against the State itself." 104 S.Ct. at 908. Generally, when a state official is sued in his official capacity the suit is one against the state and therefore barred by the eleventh amendment. As the Court recognized in Pennhurst II, however, there is an important exception to this general rule: since Ex parte Young was decided, it has been established that "a suit challenging the constitutionality of a state

official's action is not one against the State." Pennhurst II, 104 S.Ct. at 909.

As we have already noted, the plaintiffs in Edelman were suing the state officials in their official capacities. Because they were challenging the constitutionality of the state officials' action, their case was, under the theory of Ex parte Young, not against the state. The Court held, however, that the eleventh amendment nevertheless barred the suit because it was a suit for retroactive monetary relief. We think it clear from the Edelman opinion that the Supreme Court held simply that the Ex parte Young exception does not extend to suits for retroactive monetary relief; that is, suits seeking retroactive monetary relief from the state are barred by the eleventh amendment even if the claim is a constitutional

one.

We do not think that Edelman can plausibly be read to change the genral rule that suits seeking damages from state officials in their individual capacities are not barred by the eleventh amendment. In Edelman, the Court first discussed the general rules regarding when a suit against a state officer is a suit against the state. After determining that the suit was one against the state under those general rules, the Court proceeded to determine whether the federal court nevertheless had jurisdiction under the Ex parte Young rule. It concluded that the suit was barred by the eleventh amendment because, unlike the claim in Ex parte Young, it was a suit for retroactive monetary relief as opposed to prospective injunctive relief. The Court's methodology in Edelman makes it clear that

the Court was only determining the limits of the Ex parte Young exception. Had that not been its intention, there would have been no reason for it first to determine whether the suit was one against the state under the general rule.

Because such a reading better comports with the Court's opinion in Edelman, and because there is no indication in Pennhurst II that the Court intended to overrule Scheuer v. Rhodes or render section 1983 ineffective, we read the Court's statement in Pennhurst II tha "[u]nder Edelman v. Jordan ... a suit against state officials for retroactive monetary relief ... must be brought in state court," 104 S.Ct. at 920, as limited to suits against state officials that are actually suits against the state itself under the general rules we discussed earlier. Neither Edelman nor

Pennhurst II changes the well-settled rule that the eleventh amendment does not bar suits seeking damages for violation of federal law from state officials personally.[9]

As we noted above, this suit is, under the general rules, a suit against Rowland and Cosentino in their individual capacities. The Pennhurst II language is therefore inapposite. Like all section 1983 suits seeking damages from state officials personally, this case is not barred from the federal courts by the eleventh amendment.[10]

[9] We of course need not consider what effect, if any, Pennhurst II has on the availability of a federal forum for suits seeking damages for violation of state law from state officials personally. Cf. Pennhurst II, 104 S.Ct. at 917 ("[A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when ... the relief sought and ordered has an impact directly on the State itself." (emphasis added)).

[10] That is not to say that every time a state official violates federal law he is (cont.)

CONCLUSION

The damage claim against defendant Kupperman was correctly dismissed on the basis of absolute prosecutorial immunity. See Butz v. Economou, 438 U.S. 478, 98 S. Ct. 2894, 57 L.Ed.2d 895 (1978); Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). The prayer for equitable

10 (cont.)

subject to suit for damages in federal court. As we noted in Section I of this opinion, Congress did not, in enacting section 1983, repeal the common-law immunities that executive, legislative, and judicial officers had traditionally enjoyed. See Scheuer v. Rhodes, 416 U.S. 232, 238-39, 94 S.Ct. 1683, 1687-88, 40 L.Ed.2d 90 (1974); Wood v. Strickland, 420 U.S. 308, 320-22, 95 S.Ct. 992, 999-1001, 43 L.Ed.2d 214 (1975); Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). Because defendants Rowland and Cosentino do not argue on this appeal that they are entitled to enjoy any common-law immunities, we do not here consider whether any such immunity would shield them from the type of suit Dr. Demery brings.

relief against Kupperman was also properly dismissed. He has no power to bring about the result Dr. Demery seeks. However, the claims asserted against the Executive Secretary and Medical Consultant to the BMQA are not barred by the eleventh amendment. Accordingly, we reverse the dismissal of the claims against defendants Rowland and Cosentino and remand the case to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

PANNER, District Judge, Concurring:

I concur in all but part II.D of this opinion. That part, to my mind, goes beyond what is necessary. The striking differences between Pennhurst II and this case make it unwise to engage in a detailed

discussion of the relationship between Pennhurst II, Edelman, and Scheuer.

Pennhurst II holds that the eleventh amendment bars federal courts from compelling state officials to conform their conduct to state law. In that case, state officials were sued only in their official capacities. Here, by contrast, Rowland and Cosentino are sued in their individual capacities. In Pennhurst II, the Supreme Court considered a claim based on state law. Here, on the other hand, we consider a federal constitutional claim based on a federal statute, 42 U.S.C. § 1983.

The majority is concerned about the following statement from Pennhurst II: "Under Edelman v. Jordan, supra, a suit against state officials for retroactive monetary relief, whether based on federal or state law, must be brought in state

court." 104 S.Ct. at 920. The panel concedes that language is bothersome only "if interpreted literally ...." Supra, at 2666.

The Court specifically reiterated that a suit challenging the constitutionality of a state official's action is not one against the state for eleventh amendment purposes. 104 S.Ct. at 909. Obviously, the quoted language must be interpreted in light of the issues that were involved. This interpretation was neither briefed nor argued. "Clarifying" Pennhurst II should be done only where necessary.

FILED
OCT 3
ALEXANDER L. STEVAS,
CLERK

No. 84-421

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROBERT ROWLAND and
JOSEPH COSENTINO, M.D.,

Petitioners,

vs.

LEROY W. DEMERY, M.D.,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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No. 84-421

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Respondent.

SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES:

COME NOW Petitioners herein and file this Supplemental Appendix to their Petition for Writ of Certiorari, as follows:

1. The Judgment of the United States District Court for the Central District of California (entered July 8, 1982) dismissing the action with prejudice is attached hereto as Appendix "B".

2. The Order of the United States District Court for the Central District of

California (entered) July 8, 1982) adopting the findings, conclusions and recommendation of the United States Magistrate is attached hereto as Appendix "C".

3. The Final Report and Recommendation of the United States Magistrate (filed June 23, 1982) is attached hereto as Appendix "D".

4. The Report and Recommendation of the United States Magistrate Re: Motion to dismiss First Amended Complaint (filed May 12, 1982) is attached hereto as Appendix "E".

Respectfully submitted,

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APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT

APPENDIX B

JUDGMENT

United States District Court, Central District of California.

Leroy Demery, M.D., Plaintiff, v. Lawrence Kupperman, et al., Defendants. No. CV 82-4922-Kn(B).

Entered: July 8, 1982.

Pursuant to the Order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate,

IT IS ADJUDGED that the complaint for restitution, civil penalties and other relief is dismissed with prejudice.

DATED: July 2, 1982.

(s) DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT

APPENDIX C

ORDER

United States District Court, Central District of California.

Leroy Demery, M.D., Plaintiff v. Lawrence Kupperman, et al., Defendants. No. CV 81-4922-Kn(B).

Entered: July 8, 1982.

Pursuant to 28 U.S.C. §636(b)(1)(B), the Court has reviewed the pleadings and other papers herein and the attached Report and Recommendation of the Magistrate and adopts the Magistrate's findings, conclusions and recommendations.

IT IS ORDERED that Judgment be entered dismissing the complaint with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's Report and Recommendation and the Judgment by United States mail on the

plaintiff and the Attorney General for the State of California.

DATED: July 2, 1982.

(s) DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

APPENDIX D

FINAL REPORT AND RECOMMENDATION

OF UNITED STATES MAGISTRATE

APPENDIX D

FINAL REPORT AND RECOMMENDATION

United States District Court, Central District of California.

Leroy Demery, M.D., Plaintiff v. Lawrence Kupperman, et al., Defendants. No. CV 81-4922-Kn(B).

Filed: June 23, 1982.

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable David V. Kenyon, United States District Judge, pursuant to the provisions of 28 U.S.C. §636(b)(1)(B) and General Order No. 194 of the United States District Court for the Central District of California.

On May 12, 1982, the Clerk filed a Notice of Filing of Magistrate's Report and Recommendation and the Lodging of Proposed Judgment, which was served on the

parties together with copies of the Magistrate's Report and Recommendation.

On May 21, 1982, plaintiff timely filed his Objections to said Report and Recommendation. As requested by Minute Order dated May 28, 1982, respondent on June 11, 1982, filed Response to such Objections.

The said Report and Recommendation proposes that the action be dismissed with prejudice because plaintiff has not claimed that the defendants acted outside the scope of their employment, for which reason Government Code § 825 requires that damages, if any, be paid by the State of California. Under these circumstances, the Eleventh Amendment of the United States Constitution bars the action. Plaintiff objects that, because he pleaded that defendants' decision was "without any legal basis" (Amended Complaint, page 5, line 8),

defendants did act outside the scope of their employment. The contention is not logically sound. Further, and more important, the cases cited in the Response show that where, as here, the object to be accomplished is within a California state employee's express or implied authority, his act is deemed within the scope of his employment whether or not it is wrongful.

The Magistrate affirms and readopts his Report and Recommendation, proposing that the action be dismissed with prejudice.

DATED: June 12, 1982.

(s) VOLNEY V. BROWN, JR.
UNITED STATES MAGISTRATE

APPENDIX E

REPORT AND RECOMMENDATION RE:

MOTION TO DISMISS FIRST AMENDED COMPLAINT

OF UNITED STATES MAGISTRATE

APPENDIX E

REPORT AND RECOMMENDATION

United States District Court, Central District of California.

Leroy Demery, M.D., Plaintiff v. Lawrence Kupperman, et al., Defendants.

No. CV 81-4922-Kn(B).

Filed: May 12, 1983.

This Report and Recommendation is submitted to the Honorable David V. Kenyon, United States District Judge, pursuant to the provisions of 28 U.S.C. §737 and the General Order 194 of the United States District Court for the Central District of California.

The California Board of Medical Quality Assurance (BMQA) disciplined plaintiff on August 31, 1977. (Complaint, Exhibit A). Under the BMQA Order, plaintiff's medical license was revoked until plaintiff

completed an approved six month medical educational curriculum course and passed an oral examination. Plaintiff was then to be placed on probation for five years during which time the execution of the order of revocation would be stayed. Plaintiff states that there was no six month medical exucation course available which would enable him to comply with the order, but this statement was contradicted by his testimony before this Court that he attended three months of an educational course prior to entering the state penitentiary. He contends that his attorney induced the BMQA to waive the education provision of the order, but does not document this claim. Plaintiff states he has been unable to renew his license since 1978 because the BMQA insisted on enforcing the order with respect to the six month

medical education curriculum.

Plaintiff seeks five million dollars in damages ("lost earnings, mental aggravation, and other damages to Dr. Demery and to his family.") (First Amended Complaint, p. 6) from defendants Robert Rowland, Executive Director of the BMQA, and Joseph Cosentino, M.D., Chief Medical Consultant to the Board. Plaintiff also seeks injunctive relief with respect to the BMQA but has not joined the Board as a defendant.

Defendants have moved to dismiss plaintiff's first amended complaint, arguing that the Eleventh Amendment bars suit against a state official in his individual capacity when the law requires that any damages awarded be paid from state funds.

Judicial interpretations have expanded the Eleventh Amendment prohibition against citizens suing foreign states to suits by

citizens against the state of their residence when that state does not consent to be sued. (Quern v. Jordan, 440 U.S. 332, 337 (1980); Parden v. Terminal Ry. of Alabama State Docks Dept. 377 U.S. 184, reh. denied, 377 U.S. 1010 (1964); Bracco v. Lackner 462 F.Supp. 436 (D.C. Cal. 1978).)

A recent Ninth Circuit opinion supports defendants' argument. In Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981), the Court analyzed the applicability of the Eleventh Amendment to suits against state employees. The Court found no Eleventh Amendment bar to suits against the individual state employees named. Id. at 1350.[1/] In so doing, the Court took into account the fact that there

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1. Plaintiff, however, was barred from suing the Athletic Director in his official capacity for vicarious liability for the acts of other defendants. Rutledge, supra, at 1350.

was no state law which required the state to pay any damages awarded against these defendants. Id. at 1350. The Court noted that the source from which plaintiff might be paid is the most important single factor in determining whether the Eleventh Amendment bars Federal jurisdiction. Id. at 1349. California law requires that the state pay any compensatory damages assessed against any state employee acting within the scope of his employment. Cal. Gov. Code §825.

Plaintiff has made no claim or showing that the defendants were acting outside the scope of their employment, nor has he sought punitive or exemplary damages. Cal. Gov. Code §825 consequently requires the State of California to pay any sums awarded plaintiff. Under the criteria set forth in Rutledge, supra, at 1349-1350, the Eleventh Amendment bars plaintiff's Federal suit

against defendants.

Cases cited by plaintiff in opposition to defendants' motion to dismiss are inapposite. In Perez v. Rodriguez Ban., 575 F.2d 21 (1st Cir. 1978), the defendant was found liable in his personal capacity. In Bertot v. School District No. 1, 613 F.2d 245 (10th Cir. 1979), plaintiff was seeking an award of backpay as part of an action for reinstatement, rather than damages from individual defendants. The Court has been unable to locate plaintiff's third case as cited, but notes that Rutledge is the most recent authority on point in this circuit.

IT IS THEREFORE RECOMMENDED that plaintiff's First Amended Complaint be dismissed with prejudice.

DATED: May 12, 1982.

(s) VOLNEY V. BROWN, JR.
UNITED STATES MAGISTRATE

84-421

ORIGINAL (3)

Supreme Court, U.S.
FILED
NOV 26 1984
ALEXANDER L. STEVAS
CLERK

LEROY W. DEMERY, M.D.
29737 HUNSTOCK ST.
SAUGUS , CALIF. 91350
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In pro se

SUPREME COURT OF THE UNITED STATES

ROBERT ROWLAND and
JOSEPH COSENTINO, M.D.
Petitioners
VS.
LEROY W. DEMERY, M.D.
Respondent

CASE NO. 84-421

RESPONDENT'S BRIEF

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TO THE SUPREME COURT OF THE UNITED STATES:

PURSUANT TO THE LETTER FROM THE CLERK OF THE UNITED STATES SUPREME COURT DATED NOV. 7,1984 THE FOLLOWING BRIEF IS SUBMITTED. FROM A STUDY OF THE U.S. SUPREME COURT'S DECISION IN BUTZ vs. ECONOMOU (98 SCT. 2894), DEMERY'S UNDERSTANDING IS THAT IMMUNITY IS DETERMINED BY THE NATURE OF THE VIOLATION, THEREFORE A PRESENTATION OF THE ENTIRE CASE IS INDICATED.

THE CASE

THERE WERE FIVE DIFFERENT LEGAL ACTIONS TAKEN AGAINST DEMERY RESULTING FROM THE SAME SET OF COMPLAINTS, THEREFORE ALL ARE RELATED.

THE CASES WERE BASED ON 36 PRESCRIPTIONS WRITTEN BY DEMERY FROM APRIL 2,1975 THRU JUNE 4,1975 AND FROM MARCH 26,1976 THRU MAY 7,1976. THE RECORD OF THESE PRESCRIPTIONS ARE SHOWN IN THE APPENDIX PAGE A 1 THRU A 2 OF THIS BRIEF.

THE PRESCRIPTIONS WERE GIVEN TO STATE AGENTS POSING AS PATIENTS. THE CASES WERE BUILT ON THE AGENTS ACCOUNT AS TO WHAT HAPPENED IN DR. DEMERY'S OFFICE DURING THE CONSULTATION.

DEMERY WAS CHARGED WITH VIOLATING CALIF. HEALTH AND SAFETY CODE 11154. (PAGE A-21). DEMERY WAS ARRESTED AND TRIED IN THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES. THE TRIAL FROM MAY 13,1976 THRU MAY 17,1976 AND INVOLVED 24 COUNTS, SIX OF WHICH WERE CALLED FELONIES. SINCE THE ALLEGED FELONY COUNTS ARE WHAT LEAD TO THE SUPERIOR COURT TRIALS WE ARE DEALING LARGELY WITH THE NINE ALLEGED FELONY COUNTS.

THE INDICTMENTS WERE FRADULENT AS THEY WERE BASED ON THE

- PRESCRIPTIONS WRITTEN FOR EMPIRIN COMPOUND WITH CODEINE AND FOUR OF THE INDICTMENTS READ CODEINE ,ALSO KNOWN AS EMPIRIN COMPOUND WITHCODEINE, AND TWO READ CODEINE, HOWEVER ALL SIX WERE WRITTEN FOR EMPIRIN COMPOUND WITH CODEINE.

THE SECOND COURT TRIAL WAS IN OCTOBER 1977 AND THE PRESCRIPTIONS USED AS A BASIS FOR THE INDICTMENTS WERE WRITTEN FOR EMPIRIN COMPOUND WITH CODEINE, HOWEVER THE INDICTMENTS READ CODEINE, A NARCOTIC. COPIES OF THE INDICTMENTS AND THE PRESCRIPTION UPON WHICH THEY WERE BASED ARE ON PAGE A 3 thru A 21.

CODEINE IS A SCHEDULE 11 CONTROLLED SUBSTANCE WHICH IS A NARCOTIC DRUG. (CALIF. H&S CODE 11032). EMPIRIN COMPOUND WITH CODEINE IS A SCHEDULE 111 CONTROLLED SUBSTANCE WHICH IS A RESTRICTED DANGEROUS DRUG, THE SAME AS ALL PRESCRIPTION DRUGS. (CALIF. H&S CODE 11032). SEE PAGE A22 FOR COPY OF CODE.

A VIOLATION INVOLVING CODEINE WOULD BE A FELONY (CALIF H&S CODE 11371) PAGE A23. AND IN CALIFORNIA ALL CONTROLLED SUBSTANCES CARRYING A FELONY PENALTY REQUIRE THE NARCOTIC TRIPLICATE FORM TO PRESCRIBE. A VIOLATION INVOLVING EMPIRIN COMPOUND WITH CODEINE WOULD BE A MISDEMEANOR.(CALIF H&SCODE 11374) PAGE A24.

THIS FRAUD WAS CARRIED OUT IN ORDER TO TRY DEMERY IN SUPERIOR COURT WHEN ALL CHARGES WERE MISDEMEANORS. THIS FRAUD WAS SHOWN TO BE DELIBERATE AND INTENTIONAL WHEN DA CHOATE DURING THE SECOND TRIAL WHEN THE JURY WAS OUT DELIBERATING, ASKED JUDGE ALLEN TO ALLOW HIM TO CHANGE THE JURY FORMS ,AS THEY READ CODEINE AND SINCE THERE WAS NO EVIDENCE THAT CODEINE WAS USED, IF THE JURY-

- FINDS DEMERY GUILTY OF HAVING ABUSIVELY PRESCRIBED PURE CODEINE WE WILL BE IN A LOT OF TROUBLE. JUDGE ALLEN WOULD NOT ALLOW HIM TO MAKE THE CHANGE. CHOATE COULD HAVE ADMITTED THEY WERE WRONG AND ASKED TO HAVE THE CASE DISMISSED BUT HE DID NOT.

THE CASE AGAINST DEMERY WAS PUT TOGETHER WITH PERJURED DOCUMENTS OBTAINED BY ATT. GEN. KUPPERMAN. A DECLARATION UNDER PENALTY OF PERJURY BY AGENT BARBARA VAN DEIST AS TO WHAT HAPPENED IN DR. DEMERY'S OFFICE CARRIED A STATEMENT THAT DEMERY GAVE HER RITALIN AND QUAALUDE FOR PARTYING AND OTHER INFLAMATORY STATEMENTS HOWEVER AT THE SECOND TRIAL, AGENT VAN DEIST ADMITTED THAT THESE STATEMENTS WERE NOT TRUE AND THAT SHE HAD SIGNED THE DECLARATIONS WITHOUT READING IT, AFTER IT HAD BEEN PREPARED BY KUPPERMAN.
(SEE PAGE A26 THRU A29)

A DECLARATION UNDER PENALTY OF PERJURY BY AGENT COBURN ALIAS LAURIE MILLER AS TO WHAT HAPPENED IN DR. DEMERY'S OFFICE CARRIED A STATEMENT THAT SHE ASKED DR. DEMERY FOR PRESCRIPTIONS AND THAT HE WROTE THEM WITHOUT A QUESTION. HOWEVER AT THE COURT TRIAL SHE ADMITTED THAT THIS WAS NOT TRUE AND THAT SHE HAD SIGNED THE DECLARATIONS PREPARED BY KUPPERMAN WITHOUT READING IT. (PAGE A30 THRU A41 APPENDIX).

DEMERY WAS TRIED IN SUPERIOR COURT IN MAY 1976 WITH JUDGE JULIUS M. TITLE PRESIDING. AT THIS TRIAL THE DA FAILED TO HAVE A PHYSICIAN APPEAR TO OPPOSE TESTIMONY OF DR. DEMERY. THERE WAS NO CONTEST AND NOTHING TO HAVE THE JURY DECIDE. THE CASE WENT TO THE JURY ANYWAY AND A VERDICT 9 TO 3 NOT GUILTY WAS RETURNED. JUDGE TITLE SENT DEMERY BACK FOR RETRIAL

THERE WERE EIGHT ADDITIONAL COUNTS OF THE SAME NATURE THAT HAD OCCURED BEFORE THIS TRIAL BEGAN BUT WERE NOT PRESENTED. THESE EIGHT WERE CARRIED THRU A PRELIMINARY HEARING AND THE DA INDICATED THAT THEY WOULD TRY DEMERY SEPERATELY ON THE FIRST 24 COUNTS AND THE OTHER 8. JUDGE DRAKE OF THE LOS ANGELES SUPERIOR COURT ORDERED THE TWO CASES COMBINED.

WHILE AWAITING RETRIAL DEMERY FACED A CIVIL SUIT AND AN ADMINISTRATIVE HEARING BY THE BOARD OF MEDICAL QUALITY ASSURANCE. THE CIVIL SUIT WAS BROUGHT BY ATT.GEN. KUPPERMAN IN THE NAME OF THE MEDICAL BOARD. ON FRIDAY AUG. 13,1976 KUPPERMAN CALLED DEMERY BY TELEPHONE STATING THAT HE WAS APPEARING IN THE SUPERIOR COURT OF LOS ANGELES ON WED. AUG. 18,1976 TO SEEK AN INJUNCTION TO PREVENT DEMERY FROM PRACTICING MEDICINE. DEMERY INFORMRD KUPPERMAN THAT HE COULD NOT ATTEND AS HE WAS UNDER ORDERS FROM HIS DOCTOR TO CLOSE HIS PRACTICE FOR 30 DAYS AND TO AVOID ALL STRESSFUL SITUATIONS DURING THAT TIME. DEMERY'S BLOOD PRESSUE WAS ELEVATED AND HIS HEART WAS SKIPPING BEATS. DEMERY AND HIS DOCTOR THOUGHT THIS WAS AN AFTER EFFECT OF THE DEATH OF DEMERY'S WIFE WHO WAS KILLED IN A RAPE ATTEMPTON JUNE 8,1976. KUPPERMAN AGREED WITH DEMERY THAT HE WOULD POSTPONE THE HEARING UNTIL DEMERY RETURNED AFTER THE 30 DAYS. HOWEVER ON AUG. 18,1976 KUPPERMAN DID GO TO COURT AND TOLD JUDGE DOWD THAT DEMERY REFUSED TO APPEAR. JUDGE DOWD ISSUED THE INJUNCTION PREVENTING DEMERY FROM PRACTICING MEDICINE. WHEN DEMERY RETURNED FROM THE 30 DAY MEDICAL LEAVE AND APPEARED BEFORE JUDGE DOWD ON OCT. 2,1976 THE INJUNCTION WAS MODIFIED TO REQUIRE DEMERY TO DO A PHYSICAL EXAM. BEFORE PRESCRIBING CONTROLLED SUBSTANCES. DEMERY ACCEPTED THIS

- EVEN THOUGH HE FELT THAT THERE ARE INSTANCES WHEN A PHYSICAL EXAMINATION IS CONTRAINDICATED. DEMERY NEVER VIOLATED JUDGE DOWD'S ORDERS.

BEFORE THE HEARING KUPPERMAN WAS QUOTED IN THE NEWSPAPER," EVENING OUTLOOK" OF SANTA MONICA,CALIF. DATED SAT. SEPT. 18,1976 THAT DEMERY ADMINISTRATED HARD DRUGS TO KNOWN OR ADMITTED ADDICTS WITHOUT ASKING MORE THAN A FEW QUESTINS, AND THAT AT LEAST TWO PATIENTS DIED FROM DRUG OVERDOSES SHORTLY AFTER VISITING DEMERY'S OFFICE. THOSE STATEMENTS ARE COMPLETELY FALSE AND THERE HAS NEVER BEEN ANY EVIDENCE TO SUPPORT KUPPERMAN'S CHARGES.

THE ADMINISTRATIVE HEARING FOR THE MEDICAL BOARD TOOK PLACE FROM MARCH 30, THRU APRIL 11,1977. THE CASE WAS BASED ON THE TESTIMONY OF THE PAID STATE AGENTS WHO GAVE THEIR VERSION OF WHAT HAPPENED IN DR.DEMERY'S OFFICE. THE ADMINISTRATIVE LAW JUDGE BELEAVED THE AGENTS IN SPITE OF CONFLICTING TESTIMONY. FOR INSTANCE ONE AGENT ADMITTED SHE HAD BEEN WEIGHED ON A SCALE IN DEMERY'S OFFICE, THREE OTHER AGENTS STATED THAT THEY HAD EXPRESSLY LOOKED FOR A SCALE AND THAT THERE WAS NO SCALE IN THE OFFICE. WE HAVE PRESENTED FROM THE COURT TRIAL THE ADMITTED PERJURY OF TWO OTHER AGENTS. AGENT DALTON WHO WAS INVOLVED IN THE TRIAL OF ANOTHER DOCTOR WAS ACCUSED BY THE CALIF APPELLATE COURT OF HAVING VIOLATED LAW AND MORALITY IN HER EFFORTS TO OBTAIN A NARCOTICS PRESCRIPTION. DALTON WAS ASKED IF SHE HAD EVER VIOLATED HER INSTRUCTIONS IN WORKING DOCTORS, DALTON ANSWERED NO.

KUPPERMAN ATTEMPTED TO INTRODUCE TAPES THAT CARRIED THE RECORD OF WHAT HAPPENED IN DEMERY'S OFFICE AND ON PLAYING THE TAPES FOR DEMERY AND HIS ATTORNEY, THE TAPES WERE INAUDIBLE AND CONTAINED ERASURES AND THE ALJ WOULD NOT ALLOW THEM.

DURING THE HEARING IT BECAME OBVIOUS THAT THE AL.JUDGE DID NOT UNDERSTAND THE DIFFERENCE BETWEEN A MEDICAL EXAMINATION AND A PHYSICAL EXAMINATION. SINCE DEMERY HAS HAD EXTENSIVE TRAINING IN PSYCHIATRY HE CLAIMED THAT A PATIENT TALKING TO HIM HAS HAD A MEDICAL EXAMINATION EVEN THOUGH HE NEVER TOUCHED THE PATIENT. THE JUDGE ADMITTED THAT DEMERY USED HIS PSYCHIATRIC TRAINING IN HIS CONTACT WITH ALL OF THE AGENTS, BUT FOUND HIM GUILTY OF PRESCRIBING CONTROLLED SUBSTANCES WITHOUT A GOOD FAITH PRIOR EXAMINATION. THE AL JUDGE ALSO RULED THAT THERE WAS NO VIOLATION OF H&S CODE 11154.

THE BMQA ORDERED THAT DEMERY TAKE A SIX MONTHS COURSE IN GENERAL MEDICINE AS RECOMMENDED BY THE LOS ANGELES COUNTY MEDICAL ASSN. AND APPROVED BY BMQA FOLLOWED BY FIVE YEARS PROBATION DEMERY CONTACTED LACMA AND WAS TOLD THAT THEY HAD NO PROGRAM TO COMPLY WITH THAT REQUEST. DEMERY'S ATTORNEY CONTACTED THE BMQA AND THE EDUCATION PROVISION WAS WAIVED BECAUSE IT COULD NOT BE COMPLIED WITH. A PROBATION SURVELLENCE OFFICER WAS APPOINTED BY BMQA AND DEMERY WAS ALLOWED TO CONTINUE PRACTICE.

IN OCT.1977 DEMERY WAS BROUGHT TO TRIAL IN THE LOS ANGELES SUPERIOR COURT. JUDGE WARREN D. ALLEN TOOK JURISDICTION BY AN ILLEGAL RULING THAT SINCE " A TOMATO IN A SALAD IS STILL A TOMATO " CODEINE IN EMPIRIN COMPOUND WITH CODEINE IS STILL CODEINE AND THAT THE TWO ARE THE SAME. THIS IS IN VIOLATION OF CALIF H&S CODE 11032. DEMERY WAS THEN TRIED IN SUPERIOR COURT WITH THE CASE BEING BASED ON TESTIMONY BY THE SAME AGENTS WHO TESTIFIED AT THE ADMINISTRATIVE HEARING. JUDGE ALLEN STATED THAT THIS WAS HIS FIRST CRIMINAL TRIAL.MANY ERRORS WERE MADE.

- THE SAME TAPES THAT WERE INTRODUCED AT THE ADMINISTRATIVE HEARING AND REJECTED WERE ALLOWED. TYPEWRITTEN TRANSCRIPTS OF THE INAUDIBLE TAPES WERE GIVEN TO EACH JURIOR AS TAPES WERE BEING PLAYED. THIS WAS AS IF TO SAY THE TYPEWRITTEN SHEETS ARE WHAT YOU WOULD HEAR IF YOU COULD HEAR THE TYPES. JUDGE ALLEN REFUSED TO HAVE THE TAPES AUTHENTICATED BY AN EXPERT.

AGENT VAN DEIST BEGAN TO CRY ON THE WITNESS STAND AFTER SHE HAD ADMITTED PERJURY. THE REACTION OF JUDGE ALLEN IS SHOWN ON PAGE A42 & A 43 OF APPENDIX. BUT NOTHING WAS DONE.

DEMERY WAS FOUND GUILTY AND SENT TO STATE PRISON FOR NINETY DAYS OBSERVATION AND RETURNED TO COURT FOR SENTENCING ON APRIL 21,1978 . AT ONE POINT IN THE HEARING JUDGE ALLEN SAID HE WAS LEANING TOWARD PROBATION, THEN DA CHOATE ASKED DEMERY, WHAT ABOUT THE 17 YEAR OLD BOY WHO DIED FROM AN OVERDOSE IN YOUR PRACTICE. THIS IS COMPLETELY FICTITOUS. THERE WAS NEVER ANY ACQUISATION OF THIS. IF FACT DEMERY DID NOT HAVE PATIENTS UNDER 21 YRS UNLESS THEIR PARENTS CAME WITH THEM.

DEMERY WAS SENTENCED TO LAW PRESCRIBED ON THE FELONIES AND ONE YEAR ON THE MISDEMEANORS,THE SENTENCE WAS MADE CONSECUTIVE.

THE SENTENCE HAD NO LEGAL BASIS SINCE CALIF H&S CODE 11374 FOR MISDEMEANORS PROVIDES 15 TO 180 DAYS (PAGE A24) CALIF H&S CODE 11371 FOR FELONIES PROVIDE NOT MORE THAN ONE YEAR (PAGE A 23) THIS IS A SPECIFIED SENTENCE. EVEN WITH A CONSECUTIVE SENTENCE, THE METHOD OF CALCULATION USED BY STATE LAW, THAT IS THE FIRST TERM 12 MOS. PLUS ⅓ OF THE SECOND TERM 4 MOS. TOTAL 16 MOS. LESS ⅓ OFF FOR GOOD BEHAVOIR AND COOPERATION EQUALS 10 MOS & 20 DAYS . DEMERY WAS KEPT 2 YEARS.AN EXPIRED PENAL CODE

-- PC 3043 WHICH WAS REPEALED EFFECTIVE JULY 1,1977 WAS ADDED TO THE SENTENCE.(PAGE A 25).

DEMERY'S EFFORTS TO APPEAL HIS CASE WERE FRUSTRATED BY THE FACT THAT EVEN THOUGH THE TRIAL ENDED OCT. 31, 1977 THE TRIAL TRANSCRIPTS WERE NOT FURNISHED UNTIL FEB. 2,1979. THERE HAD BEEN NO MOTION TO EXTEND THE TIME FOR FURNISHING THE TRANSCRIPTS.

DEMERY HAD A COURT APPOINTED ATTORNEY TO PURSUE HIS APPEAL,HOWEVER ATT. RICHARD LEVIN DID NOT SEE OR TALK TO DEMERY BEFORE FILING THE APPEAL. DEMERY HAS ATTEMPTED TO BRING SOME OF THE MANY ERRORS AND ABUSES TO THE COURTS BUT HAS NOT BEEN ABLE TO HAVE THEM ACTED ON ACCORDING TO MERIT. ALL HAVE BEEN DISMISSED ON SOME OTHER GROUNDS.

THE IMMEDIATE CASE IS DESCRIBED IN THE MEMORANDUM AND FACTS OF LAW FILED IN THE U.S. DISTRICT COURT AND IS INCLUDED ON PAGE A 44 THRU A 50 OF THE APPENDIX.

CONCLUSION

DEMERY 'S ACTION AGAINST THE DISTRICT ATTORNEY BROUGHT UNDER PARA 1983 WAS DISMISSED CLAIMING ABSOLUTE IMMUNITY.

DEMERY'S ACTION AGAINST ATT. GEN. KUPPERMAN WAS DISMISSED CLAIMING ABSOLUTE IMMUNITY.

THE PRESENT PETITION FOR A WRIT OF CERTIORARI IS AN ATTEMPT TO GET THE OTHER TWO PARTIES OFF.

IN THE SPIRIT OF BUTZ vs ECONOMOU NONE OF THE PARTIES DESERVE IMMUNITY.

THE ABSOLUTE IMMUNITY OR ANY KIND OF IMMUNITY WILL JUST ENCOURAGE FURTHER ABUSES.

LEROY W. DEMERY PRAYS THAT THE SUPREME COURT OF THE UNITED STATES WILL TAKE ACTION TO CORRECT THE INJUSTICE OUTLINED IN THIS CASE.

I DECLARE UNDER PENALTY OF PERJURY THAT THE ABOVE STATEMENTS ARE TRUE, AND THAT THE MATERIALS INCLUDED IN THE APPENDIX ARE TRUE

DATED THIS 20 DAY OF NOVEMBER 1984 AT SAUGUS, CALIF.

LEROY W. DEMERY, M.D.

RECORD OF CONTROLLED SUBSTANCES PRESCRIBED

ED VOVERIS :

APRIL 2,1975
1-RITALIN 20mgm #100
2-NEMBUTAL gr1½ #30

MAY 2,1975
1-RITALIN 20mgm #100
2-Nembutal gr1½ #30

JUNE 6,1975
1-RITALIN 20mgm#100
2-NEMBUTAL gr1½#30
3-EMPIRIN 4 #50

GEORGE TUCKER:

APRIL 2,1975
1-RITALIN 20mgm # 100
2- QUALUDE 300mgm #30
3- EMPIRIN 4 # 50

JUNE 6,1975
1-RITALIN 20mgm #100
2-Qualude 300mgm #100
3-EMPIRIN 4 #50

JAMES YEARY :

APRIL 2,1975

1- NEMBUTAL gr1½ #30

SHARON DALTON :

APRIL 15,1975
1-NEMBUTAL gr1½ #30
2- IONAMINE # 30

MAY 9,1975
1-NEMBUTAL gr1½ #30
2- EMPIRIN 3 #50

JUNE 4,1975
1- NEMBUTAL gr1½#30
2-EMPIRIN 4#50

GEORGE BEARCROFT:

APRIL 15,1975
1- QUALUDE 300mgm #30

MAY 9,1975
NEMBUTAL gr1½ #30

BUFFORD Mc ZEAL
MAY 9,1975

1-EMPIRIN 4 # 50
2- NEMBUTAL gr1½ #30

LAURIE MILLER :

MARCH 26,1976

1- QUALUDE 300mgm # 30
2- RITALIN 20mgm #100

APRIL 23,1976

1-QUALUDE 300mgm #30
2-EMPIRIN 4 #50

DONNA MEAD :

MARCH 26,1976

1- QUALUDE 300mgm #30
2- EMPIRIN 4 #50

APRIL 23,1976

1-QUALUDE 300mgm #30
2- EMPIRIN 4 #50

BARBARA VAN DIEST :

APRIL 19,1976

1-Qualude mgm 300 #30
2-RITALIN 20mgm #100

MAY 7,1976

1- QUALUDE 300mgm #30
2- RITALIN 20mgm #100

IONAMINE A SCHEDULE IV CONTROLLED SUBSTANCE WAS NOT INCLUDED IN THE COURT CASE.

EACH PRESCRIPTION WRITTEN WAS CONSIDERED A COUNT

ALLPRESCRIPTIONS ARE FOR ONE MONTH'S SUPPLY.THERE ARE NO EXCESSES. ALL PRESCRIPTIONS ARE LEGAL.

CHEMICAL NAME	BRAND NAME
METHYLPHENIDATE	RITALIN
METHAQUALONE	QUAALUDE
PENROBARBITAL	NEMBUTAL
AMOBARBITAL	SODIUM AMYTAL
EMPIRIN 3 & 4	EMPIRIN COMPOUND WITH CODEINE GR 3 OR 4

AVAILABLE COPIES OF HANDWRITTEN

PRESCRIPTIONS ON PAGES

A-3 THROUGH A-20

ARE TOO FAINT TO BE REPRODUCED

AND CONSEQUENTLY HAVE NOT BEEN FILMED

BY CIS

EDITOR'S NOTE

PAGES A-21 thru A-26 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

§ 11154. Restriction on prescribing, furnishing, etc., substance to or for person not under practitioner's treatment

Except in the regular practice of his profession, no person shall prescribe, administer, dispense, or furnish, a controlled substance to or for any person who is not under his treatment for a pathology or condition other than addiction to a controlled substance, except as provided in this division.

Added Stats 1972 ch 1407 § 3.

Prior Law:

(a) Former § 11163.

(b) Stats 1929 ch 216 § 1b, as added by Stats 1933 ch 253 § 1½ p 783, amended by Stats 1935 ch 813 § 3 p 2206.

Cross References:

Prohibition against person prescribing, administering, or furnishing controlled substance for himself: § 11170.

Persons authorized to prescribe: § 11210; B & P C § 4036.

Limitations on right of veterinarian to prescribe, administer, or furnish controlled substance § 11240.

Punishment for violation of this section: § 11371.

Unauthorized prescribing, etc. of drugs for addict as unprofessional conduct by medical practitioner: B & P C § 2391.

Misuse of hypodermic needle and syringe as misdemeanor: B & P C § 4144.

Collateral References:

Cal Jur 2d Drugs and Druggists §§ 36, 38, Physicians, Dentists, and Other Healers of the Sick § 38.

25 Am Jur 2d Drugs, Narcotics, and Poisons § 5.

Annotations:

Entrapment defense in narcotics law prosecutions. 33 ALR2d 883.

NOTES OF DECISIONS

1. In General; Construction, Interpretation, and Application
2. Constitutionality
3. Prosecutions; Evidence
4. ——Sufficiency of Evidence
5. ——Instructions

1. In General; Construction, Interpretation, and Application

The gravamen of the offense defined in this statute is "to prescribe" or direct or order a narcotic to or for a person not under treatment for a pathology or condition other than narcotic addiction, and the offense may be committed without the use of a written prescription, as where a doctor in a hospital may prescribe or order a narcotic for a patient. People v Whitlow (1952) 113 CA2d 804, 249 P2d 35.

Since a violation of this statute does not necessarily involve a violation of § 11165 [11157] because elements indispensable to the lesser are unnecessary to the greater, the lesser is not a necessarily included offense. People v Whitlow (1952) 113 CA2d 804, 249 P2d 35.

The use of the word "false" in § 11165 [11157] does not inject the element of good faith into the crime defined in this section so that where a prescription otherwise regular is used as the instrumentality for violation of this statute, the prescription is vitiated by the use to which it is put and is transmuted into a "false" document; a "false writing" will not be construed to mean an unwarranted or false use of a genuine writing. People v Whitlow (1952) 113 CA2d 804, 249 P2d 35.

A physician may violate this section [former § 11163] by writing a prescription for a non-existent person. People v Braddock (1953) 41 C2d 794, 264 P2d 521.

Entrapment does not arise from a police officer going to a physician and obtaining from him a prescription for narcotics on the representation that the drug is to be used by the officer's wife.

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Note—The repealed section defined the "State bureau" as the Bureau of Narcotic Enforcement.

Prior Law: Former § 11004, as amended by Stats 1945 ch 955 § 2 p 1839.

§ 11029. "Production"

"Production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

Added Stats 1972 ch 1407 § 3.

Uniform Law: Uniform Controlled Substances Act § 101 subd (u).

§ 11030. "Ultimate user"

"Ultimate user" means a person who lawfully possesses a controlled substance for his own use or for the use of a member of his household or for administering to an animal owned by him or by a member of his household.

Added Stats 1972 ch 1407 § 3.

Uniform Law: Uniform Controlled Substances Act § 101 subd (w).

§ 11031. "Wholesaler"

"Wholsaler" has the same meaning as provided in Section 4038 of the Business and Professions Code.

Added Stats 1972 ch 1407 § 3.

Prior Law: Former § 11903, as added by Stats 1965 ch 2030 § 1, amended by Stats 1970 ch 1596 § 15.

§ 11032. Respective schedules to which terms "narcotics" and "restricted dangerous drugs" refer: Reference to term "marijuana"

Whenever reference is made to the term "narcotics" in any provision of law outside of this division, unless otherwise expressly provided, it shall be construed to mean controlled substances classified in Schedules I and II, as defined in this division. Whenever reference is made to "restricted dangerous drugs" outside of this division, unless otherwise expressly provided, it shall be construed to mean controlled substances classified in Schedules III and IV. Whenever reference is made to the term "marijuana" in any provision of law outside of this division, unless otherwise expressly provided, it shall be construed to mean marijuana as defined in this division.

Added Stats 1972 ch 1407 § 3.

Prior Law: Former § 11901, as added by Stats 1965 ch 2030 § 1, amended by Stats 1st Ex Sess 1966 ch 110 § 1, Stats 1968 ch 323 § 4, ch 1391 § 1.5, Stats 1970 ch 624 § 1, ch 1595 § 1, ch 1596 § 14.2, ch 1611 § 1, Stats 1971 ch 1593 § 200.

Collateral References:
Cal Jur 2d Drugs and Druggists § 26.

Law Review Articles:
The Official Report of the National Commission Studying Marijuana: More misunderstanding (1973) 8 USF LR 1.

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(1) Any felony offense described in this division involving a controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (10), (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055.

(2) Any felony offense described in this division involving a narcotic drug classified in Schedule III, IV, or V.

Amended Stats 1975 ch 1087 § 4.

Amendments:

1975 Amendment: Deleted "11351, 11352," after "11350," in subd (a).

Review of Selected 1975 Code Legislation, 7 Pacific LJ 392.

2. Probation

Defendant who had admitted a prior conviction of possession of narcotics and who, on his conviction of possession of heroin for sale had been denied probation, was entitled to have the conviction modified to one of simple possession and to have a new probation hearing, where the evidence would sustain a conviction of simple possession, but the conviction of possession for sale could not stand in view of reversible error in failing to instruct on the need for a specific intent to sell, where defendant's request for probation status had the effect of a motion to strike the prior, and where the denial of probation had been based, primarily, on the nature of the offense as possession for purposes of sale. People v Ruiz (1975) 14 C3d 163, 120 Cal Rptr 872, 534 P2d 712.

§ 11371. Violations with respect to prescriptions

Any person who shall violate any of the provisions of Section 11152, 11153, 11154, 11155, or 11156 with respect to (1) a controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (10), (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or (2) a controlled substance which is a narcotic drug classified in Schedule III, IV, or V, or who in any voluntary manner solicits, induces, encourages or intimidates any minor with the intent that such minor shall commit any such offense, shall be punished by imprisonment in the state prison or in a county jail not exceeding one year, or by a a fine not exceeding twenty thousand dollars ($20,000), or by both such fine and imprisonment.

Amended Stats 1976 ch 1136 § 1, ch 1139 § 80.5, operative July 1, 1977.

Amendments:

1976 Amendment (ch 1136): (1) Substituted "or 11156" for "11156, 11173, or 11174"; and (2) added all that part following "one year".

1976 Amendment (ch 1139—Operative July 1, 1977): Deleted "not exceeding six years" after "state prison".

§ 11371.1. Violations with respect to prescriptions: Fraud

Any person who shall violate any of the provisions of Section 11173 or 11174 with respect to (1) a controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (10), (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or (2) a controlled substance which is a narcotic drug classified in Schedule III, IV, or V, or who in any voluntary manner solicits, induces, encourages or intimidates any minor with the intent that such minor shall commit any such offense, shall be punished by imprisonment in the state prison, or in a county jail not exceeding one year.

Added Stats 1976 ch 1136 § 4.

§ 11373. Ordering education or treatment as condition of probation

Whenever any person is granted probation by the trial court after conviction for possession of any controlled substance classified in Schedule I or II, such trial court shall, as a condition of probation, order such person to secure education or treatment from a local community agency designated by such court, if such service is available and the person is likely to benefit from the service.

If such defendant is a minor, the trial court shall also order his parents or guardian to participate in such education or treatment to the extent the court determines will aid the education or treatment of the minor.

If a minor is found by a juvenile court to have been in possession of any controlled substance classified in Schedule I or II, in addition to any other order it may make, such juvenile court shall order the minor to receive education or treatment from a local community agency designated by such court, if such service is available and the person is likely to benefit from the service, and it shall also order his parents or guardian to participate in such education or treatment to the extent the court determines will aid the education or treatment of the minor.

Added Stats 1972 ch 1407 § 3.

Prior Law:

(a) Former § 11715.9, as added by Stats 1970 ch 1130 § 1.

(b) Former § 11901.1, as added by Stats 1970 ch 1130 § 2.

Cross References:

Minors, who are: CC § 25.

Involuntary detention of minors using narcotics or restricted dangerous drugs: W & I C § 708.

Care of juveniles with drug abuse or addiction problems: W & I C § 5619.

Collateral References:

Education and research programs of the United States Attorney General concerning drugs and other controlled substances: 21 USCS § 872.

§ 11374. Misdemeanor offenses, and punishment therefor

Every person who violates or fails to comply with any provision of this division, except one for which a penalty is otherwise in this division specifically provided, is guilty of a misdemeanor punishable by a fine in a sum not less than thirty dollars ($30) nor more than five hundred dollars ($500), or by imprisonment for not less than 15 nor more than 180 days, or by both.

Added Stats 1972 ch 1407 § 3.

Prior Law:

(a) Former § 11716, as amended by Stats 1st Ex Sess 1940 ch 9 § 40 p 25.

(b) Stats 1929 ch 216 § 10 p 385, as amended by Stats 1933 ch 253 § 3 p 785.

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§§ 3043, 3044. Repealed by Stats.1977, c. 165, p. —, §§ 49, 50, urgency, eff. June 29, 1977, operative July 1, 1977

Annotations Under Repealed Sections

SECTION 3041

1. In general

Inclusion of crime culminating in lesser, concurrent sentence, which as part of inmate's history of criminality is a lawful parole factor, in array of factors influencing length of confinement does not impair judicially decreed concurrency, and thus parole confinement extensions grounded on concurrent sentences do not constitute invasion of judicial sphere. In re Reed (1976) 126 Cal.Rptr. 524, 54 C.A.3d 1030, modified and rehearing denied 128 Cal.Rptr. 829, 54 C.A.3d 1030.

SECTION 3044

1. In general

Time credited to a sentence pursuant to § 2900.5 pertaining to credit for time in custody prior to commencement of sentence, operates to reduce statutory minimum sentences and time to be served in state prison prior to parole with the exception of the specific terms for parole eligibility set out in this section. 55 Ops.Atty.Gen. 318, 8-11-72.

§ 3046. Persons imprisoned under life sentence; minimum term; consideration of statements and recommendations; order

No prisoner imprisoned under a life sentence may be paroled until he has served at least seven calendar years. Where two or more life sentences are ordered to run consecutively to each other pursuant to Section 669, no prisoner so imprisoned may be paroled until he has served at least seven calendar years on each of the life sentences which are ordered to run consecutively. The * * * Board of Prison Terms shall, in considering a parole for such prisoner, consider all statements and recommendations which may have been submitted by the judge, district attorney, and sheriff, pursuant to Section 1203.01, or in response to notices given under Section 3042, and recommendations of other persons interested in the granting or denying of such parole. The board shall enter on its order granting or denying parole to such prisoners, the fact that such statements and recommendations have been considered by it.

(Amended by Stats.1977, c. 165, p. —, § 51, urgency, eff. June 29, 1977, operative July 1, 1977; Stats.1978, c. 579, p. —, § 32; Stats.1979, c. 255, p. —, § 23.)

Parole consideration procedures, see 15 Cal.Adm.Code 2265 et seq.

Prospective application of Stats.1978, c. 579, to crimes committed on or after January 1, 1979, see note under § 182.

Under Assembly Concurrent Resolution No. 2, 1977-1978, the legislature urged the Adult Authority or its successor to deny parole requests from individuals whose death sentences have been reduced to life imprisonment by judicial decision.

1977 Amendment. Substituted in the second sentence "Community Release Board" for "Adult Authority" and "Section 3042" for "Sections 3022 and 3042"; substituted in the third sentence "board" for "authority"; and deleted a provision that statements and recommendations be and remain confidential.

1978 Amendment. Inserted second sentence relating to consecutive life sentences.

1979 Amendment. Substituted "Board of Prison Terms" for "Community Release Board".

Legislative intent that Stats.1979, c. 255 only effect a change of name from the community release board to the board of prison terms, see note under Gov.C. § 11291.5.

Supplementary Index to Notes

Consecutive sentences 5.5
Eligibility for parole 4.5
Plea 2.5

1. In general

Adult authority may parole first-degree murderer after he has served minimum of seven years but may not discharge him from fixed sentence which, absent pardon or commutation, extends to his death. People v. Johnson (1974) 112 Cal.Rptr. 824, 38 C.A.3d 1.

The Adult Authority was vested with parole power and it, rather than the superior court which considered petitioner's habeas corpus petition, would determine whether petitioner would be granted parole after the restriction against parole was removed from his sentence of life imprisonment. In re Walker (1974) 112 Cal.Rptr. 177, 518 P.2d 1129, 10 C.3d 764.

2.5 Plea

Where, inter alia, defendant was informed of his rights to a speedy, public jury trial, to present a defense, to remain silent, to require proof of guilt beyond a reasonable doubt and to appeal and where, before taking defendant's guilty plea, trial court asked defendant if he knew the maximum term for first-degree murder and defendant replied "life imprisonment," defendant was not prejudiced by fact that trial court failed to tell him that life imprisonment was also the minimum sentence for first-degree murder and that he would have to serve seven years before being eligible for parole. People v. Johnson (1977) 135 Cal.Rptr. 756, 66 C.A.3d 197.

4.5 Eligibility for parole

A prisoner who is under a California life sentence while imprisoned in another jurisdiction will be eligible for parole by California authorities after he serves the seven-year minimum term in the prison of either jurisdiction. People v. Sewell (1978) 143 Cal.Rptr. 873, 574 P.2d 1231, 20 C.3d 639.

5.5 Consecutive sentences

Where defendant was sentenced to death on first count and sentences on remaining

counts were ordered to
one another but were
cution of sentence on
quirement that if the
count one were later re
es on remaining counts
tively with sentence
sentence on count one
life imprisonment other
modified as well, some
position of sentences
sentence, sentences on
merged into and ran

§§ 3047 to 3048.5 Rep
Ju

Both sections numbers
Stats.1945, c. 874,
Stats.1947, c. 1541,
pealed in 1976.
See, now, § 602.5.

§ 3049. Minimum impr

In all other cases
July 1, 1977 may be
provided by law for
where the prisoner
the minimum term of
any time after the
credits, but in no
provided, that any
prison or institution
minimum term of
after the expiration of
be paroled at any
(Amended by Stats.1

1976 Amendment.
sentence "sentenced

Law Review Commentaries

Prohibition of cons
cruel or unusual
L.R. 283.

Proof of aggravat
Determinate Sentencing
Delmen (1977) 10 Loyola
725.

Supplementary Inde

Construction with other law
Parole 2

1. In general

Petitioner, who was
sion of heroin with a
viction and who by
minimum term of
upon recidivist narcotic
gible for parole until
served, did not benefit
provision for mandatory
since his conviction
fective date of repeal
(1977) 138 Cal.Rptr. 284, 19

In light of fact that, as
gibility is concerned, parole
posed upon possessor of a
prior narcotic conviction,
more severe than that
who has suffered one
tion, and since legislature
seller's crime, while of the
possession, the more
statute precluding parole

Asterisks * * * indicate d

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff-Respondent

vs

LEROY WILLIAM DEMERY,
Defendant-Appellant

SUPERIOR COURT
NO. A320604

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE WARREND. ALLEN, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

EXCERPTS FROM THE TESTIMONY OF BARBARA VAN DEIST
PAGE471 thru473

EXCERPTS FROM THE TESTIMONY OF LAURIE COBURN AKA LAURIE MILLER
PAGE 571 thru 583

REMARKS OF JUDGE ALLEN PAGE 485 & 486

and reading that portion which you think refers to the partying, is that right?

THE WITNESS: Yes.

MR. SMOLEN: If I may, Your Honor, my specific question was with regard to a statement that she made in her declaration where she said, "In fact I told Dr. Demery I wanted the Quaalude and the Ritalin for partying."

And I was asking her if it's either on the tape or the transcripts, if she could point to that place where she said that to the doctor.

THE COURT: You are being asked --

Q BY MR. SMOLEN: Had he done that, Miss Van Diest?

A No.

Q So you didn't really say to the doctor, "I want Quaalude or Ritalin for partying," did you?

A No.

Q When you were asked to sign the declaration did you cross that out and make a correction there?

A No.

Q Did you have any idea what these declarations were going to be used for?

A No.

Q Did you know it was under penalty of perjury when you signed it?

A Yes.

Q Now, on your first visit, Dr. Demery told you that you could not have empirin and codeine unless you had a reason, or words to that effect, is that correct?

A Or words to that effect, yes.

Q And it is your testimony that he nevertheless wrote you prescriptions for two other medications and you never gave him any reason?

A Correct.

Q Did you ever tell Dr. Demery that you couldn't sleep?

A Never.

Q Did you ever tell him you were having difficulty sleeping?

A Never.

Q Does any discussion of sleep appear on the tape?

A No.

Q That you are certain about, is that correct?

A No.

THE COURT: Well now, wait a minute. We have got a negative question with a negative answer, and I can't tell, and I don't think the jury can, what the question and the answer mean.

This is so typical, counsel asks negative questions and you get negative answers, with the question ending with "is that correct," and the answer is "No," and we don't know what the answer is.

Start again, counsel.

MR. SMOLEN: I will start again.

Q Are you saying that you don't know whether -- strike that.

Are you saying that there is no discussion of

sleep on the tape?

A There shouldn't be any, no. There is -- no, there is not.

Q Are you certain of that?

MR. CHOATE: Aregumentative. Object.

THE COURT: Overruled.

THE WITNESS: To the best of my knowledge there is not.

Q BY MR. SMOLEN: Are there in fact -- isn't it true, Miss Van Diest, that there are -- there were a lot of words said by yourself and a lot of words said by Dr. Demery that are not audible on the tape and are not discernible in the transcripts?

A That's true.

Q Did you ever tell Dr. Demery you were depressed?

A Never.

Q And when you went to visit him on April 19th you say you had been up since -- or you got there -- what time did you first get there?

A Six a.m.

Q What time did you have to get up in order to get to the doctor's office at 6 a.m.?

A Five.

Q What area of the city were you living in at that time? I am not asking for your exact address.

A I believe I was living in Glendora.

Q Glendora?

A Yes.

Q Where is that?

your handwriting?

A Yes, it is.

THE COURT: What's the date?

MR. SMOLEN: It's dated August 5th.

THE COURT: Put a clip on it, because the clerk is going to have to find that in order to put a marking on it.

Q BY MR. SMOLEN: Now, did somebody hand you this declaration and ask you to read it and sign it?

A Yes.

Q Do you know who gave it to you?

A No, I don't recall now.

Q Do you know the circumstances under which this declaration was prepared?

A What do you mean by circumstances?

Q Well --

THE COURT: If you don't understand the question -- the questions only go from one direction, from the attorney to the witness.

THE WITNESS: Oh.

Q BY MR. SMOLEN: Do you know who Mr. Kuperman is?

A Yes.

Q He is the deputy attorney general who did the administrative hearing, is that correct?

A Yes.

Q And did you have a conversation with him before this declaration was prepared, where you gave him certain facts and even prepared the declaration and gave it to you and asked you to sign it?

A I had a couple of conversations over the phone with him.

Q He called you up?

A Yes.

Q And he asked you for information about your experiences at Dr. Demery's office --

A Yes.

Q -- is that correct.

And based on those, he then produced this declaration which you signed, is that correct?

A Yes.

THE COURT: We will take our morning recess. We will be in recess, since we started a little late, for a shorter time.

We will take a 15-minute recess, ladies and gentlemen, until about 18 minutes after 11. Please keep in mind the admonition of the court.

(Recess.)

THE COURT: You may proceed.

LAURIE COBURN

resumed the stand and testified further as follows:

CROSS-EXAMINATION (Resumed)

BY MR. SMOLEN:

Q Miss Coburn, there came a point in the -- in your visit of April 23rd, the same day you had the tape recording, where you told Dr. Demery that empirin codeine relaxes you, is that correct?

A Yes.

Q Were you telling Dr. Demery at that time that you were tense and needed something to relax you?

A No.

Q Well, when you said "It relaxes me," what did you mean by that?

A Well, he was pressing for an answer, and this was the first thing that popped into my mind, really.

Q So he was pressing for a reason why you wanted the empirin with codeine, is that correct?

A Yes.

Q And you knew you were not supposed to give a medical indication, is that correct? Is that true?

A True.

Q Did you say, "Empirin with codeine gets me loaded, makes me high, makes me feel good," anything like that?

A No.

Q Did you say, "I am a doper and I want to have a party Friday night and give all my friends empirin with codeine," and you wanted to have a nice party?

A No.

Q You said, "It relaxes me," is that correct?

A Yes.

Q You talked about the effect the medication has on your body in terms of, it makes you feel relaxed, is that correct?

A Yes.

Q Now, in your mind at that point were you giving

a medical reason for the use of the medication?

A I didn't think of it as a medical reason.

Q Isn't it true that the reason you said, "It relaxes me," was because you wanted the doctor to write the prescription and you wanted to give him a reason so he would write the prescription?

A Yes.

Q In fact -- you have never even used empirin with codeine, have you?

A Yes.

Q You have used it?

A Yes.

Q Does it relax you?

A No.

Q What does it do?

A It relieves pain.

Q So when you have pain you take the empirin with codeine and you no longer have the pain, is that correct?

A Correct.

Q You are more relaxed, is that correct?

A Well, in a sense, yes.

Q The pain makes you tense, does it not?

A A Yes.

Q So when you told Dr. Demery that empirin with codeine relaxes you, you were telling the truth, weren't you?

A Yes.

Q And that's because you wanted him to write the prescription, isn't that true?

A Yes.

Q You wanted that prescription. Right?

A Yes.

Q In fact when you said -- in talking about the empirin with codeine Dr. Demery said, "Why do you need this other stuff," and you said, "Well, does it matter," and he said, "Well, sure it does."

Isn't that true?

A We didn't say it exactly like that.

Q Oh, you didn't?

A I mean he said that, but he didn't -- he didn't say it in the same tone of voice you did.

Q He didn't use my emphasis?

A No.

Q But when you said to him, when he asked you why you need this other stuff, and you said, "Well, does it matter," he said, "Sure it does, it does matter," is that correct?

A Yes.

Q Now, wasn't the doctor communicating to you at that time that he wasn't just going to write you the prescription just because you asked for it?

MR. CHOATE: That calls for a conclusion as to what the doctor meant.

THE COURT: No, it implies what she thought the doctor was saying.

You certainly can't tell us what the doctor throught, but what you thought the doctor was saying to you.

Q BY MR. SMOLEN: What did you think Dr. Demery meant when he said "Sure it matters why you need it"?

A Well, because he did want an answer. He wanted a reason for the prescription.

Q A reason more than just your mere request for the prescriptions. Right?

A For that partciular prescription, yes.

Q So when you said, "I asked for them and he wrote them," is that a true statement?

A Pardon me?

Q That you asked for the prescriptions? At one point you said words to the effect, "I asked for the prescriptions and he wrote the prescriptions."

A Yes.

Q Is that in fact a true statement?

A Yes.

Q You hesitated. Was there more you wanted to say?

A Well, I asked for the prescriptions and he wrote them. That's what I had in my declaration. Is that what you are referring to?

Q Well, you also said that in court today.

A Okay. Well, he did. I mean there was a little bit of a conversation regarding it, but there -- you know -- there was no physical, nothing on where the pain was or anything.

Q Isn't it true that when Dr. Demery said "Sure it does, it does matter why you want the empirin with codeine,"

you knew he wasn't going to just write you the prescription because of your request, that you had to have some reason why you wanted it?

A True.

Q And you also knew that if you just said, "I just want it," that wouldn't be enough, didn't you?

A It might have been.

Q But you didn't say that, did you?

A No, I didn't.

Q In fact you talked about the effect that the medication had on your body, you said, "It relaxes me."

Isn't that true?

A True.

Q Doesn't that communicate that your body needs relaxation, because it's tense?

A Well, I would not think that there would be a drug given to someone for nerves or relaxation.

Q Well, that may be true, but the point is, when you say to somebody, "It relaxes me," and they ask you what a medication is for and you say, "It relaxes me," doesn't that -- aren't you communicating, "I'm tense, I need relaxation"?

A I didn't feel like I was particularly communicating that to him, no.

Q And you didn't feel that you were violating your instructions about not giving a medical reason when you said that to the doctor?

A No, I didn't feel like I was violating -- giving a medical reason.

Q You didn't think that was a medical reason?

A No, I didn't.

Q Now, when you signed this declaration for Mr. Kuperman -- may I approach the witness, Your Honor?

THE COURT: Yes. Referring to Exhibit I?

Q BY MR. SMOLEN: That was signed under penalty of perjury, is that correct?

A Yes.

Q And you understand what that means, do you not?

A Yes.

Q And you have a description here of your visit of April 23rd, 1976, is that correct?

A Yes.

Q And in your description you say, "I asked whether I needed a reason --" pardon me. Strike that.

You say, "He asked what I would like and I told him Quaalude and empirin with codeine. He said 'Fine' on the Quaalude but asked me why I wanted the codeine."

Is that what is in your declaration?

A Yes, I believe so. I mean I would have to reread the declaration to see if that is exactly --

THE COURT: Well, it's there before you. He wants you to look at it to see if that is what you said.

THE WITNESS: Okay. Is this is?

THE COURT: No, it's in the folder there.

MR. SMOLEN: It's in the folder that I placed on the ledge in front of you.

THE COURT: He is not talking about the declaration you

made back at the office.

THE WITNESS: Oh. Okay.

THE COURT: He is talking about this one that is in the file which involves this proceedings which you gave the number of.

THE WITNESS: I see what you mean. Where I said that?

Q BY MR. SMOLEN: I am talking about here, where it has the following language, quote:

"I was called into Dr. Demery's office. After greeting Dr. Demery I asked if he could write a couple of prescriptions for me. He asked what I would like, and I told him Quaalude and empirin with codeine. He said 'Fine' on the Quaalude, but asked why I wanted the codeine."

That's what you put in your declaration under penalty of perjury, is that correct?

A Yes.

Q Now, in fact we have already learned that when you said to Dr. Demery, "Would you write me a couple of prescriptions," he said, "I might. Just what do you need and how come," referring to both prescriptions, is that correct?

A True.

Q So in that regard your declaration under penalty of perjury is not correct, is it?

A I don't know how to answer that.

Q Well, is it correct or isn't it?

A This isn't corrected.

Q The declaration under penalty of perjury is not correct?

MR. CHOATE: Referring to the file, Your Honor.

THE COURT: Exhibit I.

THE WITNESS: Can I ask you a question?

THE COURT: No. If you understand the question, answer it please.

THE WITNESS: Okay.

Q BY MR. SMOLEN: Is this statement correct, the statement I just read, where Dr. Demery said "fine" on the Quaalude, but asked you why you wanted the codeiene? That's not a correct statement, is it?

A It was on March 26th that he said -- he used the word "fine" on the Quaalude.

Q Looking at your declaration, if you look at paragraph four, at the very top it says "On or about April 23rd."

A Yes, I can see.

Q And then it proceeds to describe what happened on that date, is that correct?

A True.

Q So isn't it -- so in other words your description in your declaration under penalty of perjury, in this superior court file, as to what happened on April 23rd, 1976, is not correct, in that particular, is it?

A No.

Q Then it goes on further to say, "I asked whether I needed a reason, and he said it was for pain. I did not

say anything else."

Now in fact when you said to Dr. Demery, "Does it matter," he said, "Sure it does," didn't he?

A Yes.

Q So that's not correct either, is it?

A No.

Q And then when you said, "I did not say anything else," it turns out that you later said, "It relaxes me," and that was your reason, isn't that true?

A True.

Q And you didn't put that in your declaration either, did you?

A I didn't write this up.

Q I understand that. You talked to Mr, Kuperman two times on the telephone and you gave him the information as to what happened, is that right?

A True.

Q And then he or somebody from his office came to you and had this typewritten declaration and asked you to read it and sign it under penalty of perjury, is that right?

A Yes.

Q And you read it and you signed it, is that right?

A I can't remember reading it, to tell you the truth.

Q Are you saying that you signed --

A I can't remember the exact -- even the day that I did sign it. I probably did skim through it or read through it, but I just assumed it was what had been discussed

on the telephone.

Q And are you now saying that's not what you told Mr. Kuperman?

A I can't recall our entire conversation on the phone, no.

Q Well, would you look at the declaration, ma'am.

Did you tell Mr. Kuperman that that's what happened, what's written in the declaration, or did you tell him something different?

A Well, it's basically what was said, except the part about the relaxation.

Q That was left out, wasn't it?

A Yes.

Q Did you tell Mr. Kuperman that you had told Dr. Demery that "the medication relaxes me," and that's the reason he wrote you the prescription?

A I don't recall.

Q So you may have said that?

A I may have. I may have not.

Q That wouldn't help the Department of Consumer Affairs' case, would it, if you told them that Dr. Demery -- you told Dr. Demery "it relaxes me," would it?

A I am not qualified to answer that.

MR. SMOLEN: I have nothing further at this time.

THE COURT: You may redirect.

MR. CHOATE: Thank you, Your Honor.

made in that regard -- and in other words, my understanding of the law is, if the witness has been excused I cannot put on any other evidence to impeach the witness and have that come in for all purposes.

THE COURT: Well, I don't understand it to be that way, but you may be right. In any event if that is the case the court is not going to prohibit you from putting on that impeaching testimony just because she has returned to some spa in Mexico.

In any event we will take a recess while you get the file -- which apparently is a great surprise to you that such a file exists -- up here during the recess so that you can confront her with the declaration and her signature.

MR. SMOLEN: It's not a surprise to me that the file exists, Your Honor. I never said that. I have known about the file --

THE COURT: Well, we are going to waste some more time while you get the file up.

We will be in recess for bout 20 minutes while you see if you can get the file. Do you know the number of the file?

MR. SMOLEN: Yes. I have the case number right in front of me.

Another thing, Your Honor. The witness is now crying on the witness stand -- which I have no idea what that's all about -- in front of the jury, and it is extremely prejudicial to the defense.

THE COURT: Do you know what I am about to do; I am

about to declare a mistrial in this circus, what I consider has become practically a circus. I have rarely if ever seen a case tried like this case is being tried. However, I am not going to do so at this time.

I do note in turning around that the witness is crying on the witness stand. It's unbelieable. I just can't believe that 14 people from the community are being subjected to a spectacle like this as to how our judicial system functions.

All right.

(The following proceedings were held in open court:)

THE COURT: We are going to be in recess, ladies and gentlemen, and we will be in recess for 25 minutes. Counsel wish to get some evidence here which they wish to use in recross-examination.

We will be in recess until five minutes of 3. Please keep in mind the admonition of the court.

The witness is ordered to return at that time.

(Recess.)

THE COURT: You had some further cross-examination, Mr. Smolen, before this witness is excused?

MR. SMOLEN: I have some more questions at this time, Your Honor.

THE COURT: All right.

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In Pro. Per.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LEROY W. DEMERY, MD Plaintiff vs. LAWRENCE KUPPERMAN, et al Defendants	Case No. CV 81-4922-Kn(E) MEMORANDUM OF CONTENTIONS OF FACT AND LAW

TO: The Hon. Volney V. Brown, Jr., U.S. Magistrate

In compliance with Court Order of August 21, 1984, the following contentions of fact and law are submitted.

1- Dr. Demery's license to practice medicine was withheld by Employees of the Board of Medical Quality Assurance from March 1, 1978 to the present date, November 1, 1984, and they continue to withhold this license.

2- This was done without a legal basis and in violation of BMQA's Administrative Order which became effective on the 29th day of August 1977. This was also in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

3- This violation was carried out by the defendants and persons acting under their orders, claiming to enforce a portion of the BMQA's order relating to a provision for Medical Education.

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4- The action was a ploy, a deliberate act of bad faith to keep Dr. Demery out of the practice of medicine.

DISCUSSION

BMQA's order provided that if Dr. Demery failed to comply with any of the terms and conditions of the order, the Board, after providing notice and giving Dr. Demery an opportunity to be heard, could terminate the probation and reimpose the order of revocation, or take other such action as BMQA in its discretion deemed just and reasonable.

Dr. Cosentino, without any notice to Dr. Demery, wrote a letter in December 1977 to Dr. Ludlow Creary regarding a program of Medical Education for Dr. Demery. Dr. Demery was not allowed to renew his License when it expired on February 28, 1978.

In December 1979, after being told by Dr. Joseph Gans in the local office of the BMQA that Dr. Demery had to take the course designated by Dr. Creary, Dr. Demery contacted Dr. Creary two days later and found out Dr. Creary had not designated a program.

In the interview with Dr. Gans in December 1979, Dr. Demery was told that his probation had been suspended by Dr. Cosentino and Mr. Robert Rowland, Executive Secretary of the BMQA. Dr. Demery indicated he would take the course and asked to see a copy of the outline of the course. Dr. Gans remarked, "Oh, we thought you would not agree to take it, I had it here somewhere." Dr. Gans then proceeded to look about his desk, then remarked, "I had it, but now I cannot find it, I will have to get in touch with Dr. Creary as he made it up, so I will get in touch with him and get back to you."

Dr. Creary indicated to Dr. Demery that he, Dr. Creary, had no

official connections with the BMQA, that he was at the time a member of the District Medical Review Committee but now was not, and that he had agreed to design this program as a favor.

Dr. Demery kept in contact with Dr. Creary, trying to facilitate the process of designing the program. Dr. Creary first indicated that there would be no charges for the program as Dr. Demery was one of the founding fathers of the Charles Drew Medical School, and further that Dr. Demery would be paid a stipend while he took the course. In August, 1980, Dr. Creary indicated that he could not get the stipend. In December, 1980, Dr. Creary indicated that Dr. Demery would have to pay tuition. In January, 1981, Dr. Creary indicated that the tuition would be $6,500. The only terms available were $1,500 down and $250 per week. However, no Medical Education program had been approved by the BMQA when Dr. Demery filed his court action on September 21, 1981. The fact that more than 5 years passed and there was still no BMQA-approved course available for Dr. Demery to take would appear to any reasonable mind that the defendants never intended that there be such a course. Instead, the defendants clearly intended to establish conditions that the plaintiff would not or could not meet, and thereby permanently deny renewal of Dr. Demery's license without benefit of due process.

Dr. Demery asked Dr. Cosentino by letter in December, 1977, to file a brief with Judge Allen, the California Superior Court judge in the criminal court trial , regarding the differences between Codeine and Empirin Compound with Codeine. Dr. Cosentino did not act on this request. It is difficult to understand why he did not. Even though we know he was not obligated to do so or compelled to

do so, the question as to why he would allow a fellow physician to go to state prison when it could have been prevented shows an extreme bias.

The fact is that Dr. Demery was tried in Superior Court due to an erronious ruling by Judge Allen that, "since a tomato in a salad is still a tomato," therefore Empirin Compound with Codeine was the same drug as Codeine. This is in violation of California Health and Safety Code 11032. If this issue had been clarified, Dr. Demery would have been released as all charges were actually misdemeanors under the Health and Safety Code, and he was tried in Superior Court (California Penal Code 1462, and People vs. Smith 231, CA 2nd 140, 41 CAL). If the chief medical consultant to the BMQA did not know the difference between "Codeine, A Narcotic Drug" and "Empirin Compound With Codeine" as specified in CA H&S Code 11032, then who should one look to? The lack of action by Dr. Cosentino on this issue reinforces the Plantiff's contention that the action on the Educational Provisions of BMQA's order was a ploy, and demonstrates the defendants' bad faith and intent to establish conditions that could not be met, therefore permanently withholding the plaintiff's license without due process. If Dr. Demery's license had been in effect, he could have hired an attorney to pursue the appeal of his court case and not have had to accept a court-appointed attorney , who proceeded without ever seeing or talking to Dr. Demery. Important issues such as Judge Allen's erronious ryling, were never presented to the courts, any one of which would have caused a reversal of the case.

Further withholding of Dr. Demery's license prevented him from earning any funds which would enable him to hire attorneys to

pursue any of the many legal legal ramifications in this case to provide him restitution.

Mr. Robert Rowland's role as executive secretary of the BMQA involves him on the principle that he either knew or should have known about this illegal activity within his area of responsibility. Robert Rowland was contacted by persons from the community regarding Dr. Demery's status. Robert Rowland did know of BMQA's violations and was responsible for the acts of state employees under his authority.

> As regards to a violation of this section (Para 1983 USC Title 42) the requisite causal connection can be established not only by some kind of direct personal participation in deprivation but also by setting in motion a series of Acts by others which the actor knows or reasonably should know would cause others to inflict the Constitutional injury (ld note 115 P 235 USC title 42).

This clearly binds Rowland and Cosentino as the responsible parties in this case.

The fact that Dr. Demery attempted to comply with the illegal acts of BMQA employees in no way could waive his constitutional rights. If the due process procedure had been observed, the entire case would have been reviewed and there is no possibility that this case would be upheld on appeal.

Since Dr. Demery was not notified of the proposed enforcement of the Medical Education requirement and given an opportunity to be heard before his license was withheld, the action is therefore ineffective. This means that the probation continued for five

years and ended September 1, 1982. The BMQA's Administrative Order ended at the same time and Dr. Demery's license should be fully restored subject to current conditions. The Defendants do not have the authority or the right to withhold, and continue to withhold, the plaintiff's license without due process.

Factors in the request for money damages:

1- Seven years of extreme emotional pressure

2- Projected earnings from March 1, 1978 to present

3- Loss of liberty and property

4- Damages to Dr. Demery's three children, all of whom were on their way to becoming professionals and halted due to this violation

The five million dollars asked is a pittance in regards to the damages actually done.

CONCLUSION

Dr. Demery's licnese to practice medicine has been withheld illegally since March 1, 1978 by the unlawful action of Joseph Cosentino, MD, Chief Medical Consultant to the BMQA, and Robert Rowland, Executive Secretary to the BMQA.

Dr. Demery prays that the Court will order that the action of Joseph Cosentino, MD, and Robert Rowland be ineffective and that Dr. Demery's license be restored subject to current conditions; and that the probation ended five years after it began on September 1, 1982; and that the Administrative Order ended on September 1, 1982;

And that Damages of Five Million Dollars be paid to Dr. Demery by Joseph Cosentino, MD, and Robert Rowland.

I declare under prnalty of perjury that the above statements are true.

Dated: November 1, 1984.

Leroy W. Demery, MD